Supreme Court, U.S.
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No. 14-916

In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Department of Veterans Affairs permissibly concluded that 38 U.S.C. 8127 did not require it to utilize a small-business contracting preference before placing an order under a pre-existing Federal Supply Schedule contract.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 754 F.3d 923. The opinion of the Court of Federal Claims (Pet. App. 33a-71a) is reported at 107 Fed. Cl. 226.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2014. A petition for rehearing was denied on September 10, 2014 (Pet. App. 73a-74a). On November 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 8, 2015. On December 29, 2014, the Chief Justice further extended the time to January 29, 2015, and the petition was filed on that date. The petition was granted on June 22, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent provisions of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (2006 Veterans Act), Pub. L. No. 109-461, 120 Stat. 3403, and other statutes and regulations are set forth in the appendix to this brief. App., *infra*, 1a-59a.

STATEMENT

A. Government Procurement Background

Federal procurement is comprehensively regulated by myriad statutes and thousands of pages of regulations, which give agencies many ways to procure supplies and services from different sources. As a general rule, a civilian agency "shall" (1) "obtain full and open competition through the use of competitive procedures" in accordance with federal statutes and the Federal Acquisition Regulation (FAR); and (2) "use the competitive procedure[s] * * * best suited under the circumstances of the procurement." 41 U.S.C. 3301(a).[1] The FAR is a "single Government-wide procurement regulation." 41 U.S.C. 1303(a)(1). Agencies "shall" follow the FAR in procurement. 41 U.S.C. 1121(c)(1).

1. Agencies can procure by soliciting and awarding new contracts on the open market. Such new contracts are generally awarded on a competitive basis through sealed bidding, by negotiation, or via simplified acquisition procedures. 41 U.S.C. 3301(b)(1), 3305(a). When contracting by negotiation or through sealed bidding, a contracting officer generally must

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[1] Different statutes apply to the Department of Defense, the Department of Homeland Security, and the National Aeronautics and Space Administration (NASA). See 10 U.S.C. 2302(1), 2304.

give pre-solicitation public notice by posting a synopsis of the opportunity on a website, ordinarily 15 days in advance, 48 C.F.R. 5.101(a)(1), 5.201(b)(1), 5.203(a);[2] prepare a solicitation with detailed terms and conditions, see 48 C.F.R. 14.201-1, 15.204; publicly solicit bids or quotes while giving potential offerors reasonable time to respond, ordinarily at least 30 days, 48 C.F.R. 5.203(b) and (c); formally evaluate each offer according to stated criteria, 41 U.S.C. 3306(c), 3701(a); and negotiate, as appropriate, before awarding the contract to the responsible source that offers the best value to the government, 41 U.S.C. 3702, 3703(c).

"Simplified acquisition procedures" can be used for contracts in amounts not greater than the simplified acquisition threshold (currently $150,000), or for acquisitions of commercial items not greater than $6.5 million. 48 C.F.R. 2.101, 13.000; see 41 U.S.C. 134, 1901(a); see also 41 U.S.C. 1908 (inflation adjustment). Those procedures are flexible and evaluation is less formal. See 48 C.F.R. 13.003(a), 13.106-2(b)(1). But they still generally require the agency to publicly post a synopsis of the opportunity in advance, 48 C.F.R. 13.105(a); determine applicable terms and conditions, see 48 C.F.R. 13.302-1, 13.302-5; request quotes with reasonable time to respond, 48 C.F.R. 13.003(h)(2); and determine that the price is fair and reasonable, 48 C.F.R. 13.106-3(a). Simplified acquisition procedures, sealed bidding, and negotiated contracting are regulated in FAR Parts 13, 14, and 15, respectively.

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[2] The FAR and the Department of Veterans Affairs Acquisition Regulations (VAAR) are codified in Title 48 of the Code of Federal Regulations. Unless otherwise noted, all FAR and VAAR cites in this brief are to the 2011 edition that was current at the time of the procurement at issue here.

2. Agencies can also procure "from or through Government supply sources." 48 C.F.R. 8.000. Many such sources are potentially available. *Inter alia*, agencies "shall," to the extent practicable, acquire supplies from their own or other agencies' inventories. 40 U.S.C. 524(b). Agencies may procure via contracts with other agencies. See 31 U.S.C. 1535(a). Agencies may enter into indefinite-delivery contracts and then procure over the course of time by placing orders under those pre-existing contracts. See 41 U.S.C. 4101, 4103(a), 4106. Contracts under which multiple agencies (in some instances, every agency) can place orders are known as "multi-agency contracts" or "[g]overnmentwide acquisition contracts." 48 C.F.R. 8.004(a)(1) (2014).

Agencies "shall" purchase certain items or services via the Committee for Purchase From People Who Are Blind or Severely Disabled, also known as the AbilityOne program. 41 U.S.C. 8504(a); see 41 U.S.C. 8502, 8503. Agencies "shall" purchase certain products from Federal Prison Industries, Inc. 18 U.S.C. 4124(a); see 18 U.S.C. 4121. And federal law imposes specific rules for the acquisition of a variety of goods and services. For example, "[a]ll printing" services "shall be done" at the Government Printing Office (GPO). 44 U.S.C. 501.

The Federal Supply Schedule (FSS) program, also known as the Multiple Award Schedule program, is the "premier" government supply program, with tens of billions of dollars spent via the FSS each year. Gen. Servs. Admin., *For Vendors – Getting on Schedule* (June 1, 2015), http://www.gsa.gov/portal/content/198473 (*GSA Vendor FAQ*); see 48 C.F.R. 8.402(a). The FSS provides federal agencies

with a "simplified process for obtaining commercial supplies and services at prices associated with volume buying." 48 C.F.R. 8.402(a); see 48 C.F.R. 38.101(a). The General Services Administration (GSA) or an agency with delegated authority solicits and awards indefinite-delivery contracts to vendors that agree to sell "at stated prices for given periods of time, for delivery within a stated geographic area." 48 C.F.R. 38.101(a); see 48 C.F.R. 38.101(d). GSA seeks the vendor's best price (*i.e.*, the best price given to its most favored customer), and vendors must reduce prices further under certain circumstances. See 48 C.F.R. 538.270(a), 552.238-75. "For any given item, GSA awards *multiple* contracts, hence the term 'Multiple Award Schedule.'" John W. Chierichella & Jonathan S. Aronie, *Multiple Award Schedule Contracting* 41 (2002) (*FSS Contracting*).

"These contract types were intended to reduce the administrative costs of contracting by reducing both the number of businesses and the types of terms and conditions which had to be completed for each task or delivery order." S. Rep. No. 343, 111th Cong., 2d Sess. 7 (2010) (2010 Senate Report). "Under such contracts, the government negotiates an up-front agreement on future price discounts and delivery terms, but no actual work is performed or paid for until task and delivery orders are issued." *Ibid.* Any agency can then place orders under pre-existing FSS schedule contracts, without going through the potentially cumbersome process of soliciting and awarding a new contract on the open market. See 48 C.F.R. 8.404(a). FSS ordering is thus particularly useful for relatively small-dollar or repetitive procurements.

GSA administers dozens of schedules, ranging from filing cabinets (Schedule 71, category 711-3) to software licenses (Schedule 70, categories 132-32 and 132-33). See GSA, *eLibrary*, http://gsaelibrary.gsa.gov/ElibMain/home.do (last visited Sept. 28, 2015). Agencies search for supplies or services on the GSA Advantage! website or request quotes on the GSA e-Buy website. 48 C.F.R. 8.402(c) and (d). A contracting officer should generally review offers or quotations from three or more FSS vendors. See 48 C.F.R. 8.405-1(c)(1) and (d)(3)(ii), 8.405-2(c)(2)(ii) and (3)(iii)(B). In placing an order, the contracting officer determines that the selected offer or quotation offers the "best value * * * and results in the lowest overall cost alternative to meet the Government's needs." 48 C.F.R. 8.404(d); see 48 C.F.R. 2.101 (defining best value). For orders over $500,000, a contracting officer must also make an independent determination, considering the "administrative cost savings from using an already existing contract" and other factors, that the FSS is the "best procurement approach." 48 C.F.R. 17.500(b), 17.502-1(a)(2)(ii)(A).

Congress established the FSS's predecessor in 1910, under the direction of a "general supply committee." Act of June 17, 1910 (1910 Act), ch. 297, § 4, 36 Stat. 531; see *FSS Contracting* 56. The committee was later renamed the Bureau of Federal Supply, which issued regulations governing the program. See 13 Fed. Reg. 8762 (Dec. 30, 1948) (to be codified at 41 C.F.R. 2.7, 3.1). In 1949, Congress created the GSA, transferred the Bureau's functions to it, and repealed the 1910 Act. Federal Property and Administrative Services Act of 1949, ch. 288, §§ 101(a), 102(a), 502(a)(29), 63 Stat. 379, 380, 401. Congress directed

that the GSA "shall prescribe policies and methods" for procurement and supply for executive agencies; "shall procure and supply personal property and non-personal services" for agencies; and "shall prescribe" regulations regarding procurement as necessary. 40 U.S.C. 501(b)(1)(A) and (2)(A). GSA's initial regulations implemented the FSS program. See 15 Fed. Reg. 1346 (Mar. 14, 1950) (redesignating and renumbering the Bureau of Federal Supply's regulations); 44 C.F.R. 52.7, 53.1 (Supp. 1957).

Since the FAR's inception, FSS orders have been regulated by Part 8. See 48 Fed. Reg. 42,129, 42,134-42,138 (Sept. 19, 1983) (original FAR). Congress subsequently provided that FSS orders satisfy the overarching statutory requirements that procuring agencies use "competitive procedures," so long as "participation in the program has been open to all responsible sources" and "orders and contracts under [the FSS] result in the lowest overall cost alternative to meet the needs of the Federal Government." 41 U.S.C. 152(3); see 41 U.S.C. 3302 (further competition requirements for FSS orders).

3. Congress has created a series of preferences for small businesses when an agency is soliciting and awarding contracts on the open market. The path-marking law is the Small Business Act of 1953, ch. 282, Tit. II, 67 Stat. 232, as amended, 15 U.S.C. 631 *et seq.* The Small Business Act requires the President (and each agency) to set government-wide (and agency-wide) goals for contracting with small businesses. 15 U.S.C. 644(g)(1)(A) and (2)(A). The minimum government-wide goal for all small-business contracting is 23%. 15 U.S.C. 644(g)(1)(A)(i). Agency goals must represent the "maximum practicable oppor-

tunity" for small-business concerns. 15 U.S.C. 644(g)(1)(B). Section 15 of the Small Business Act provides that small-business concerns "shall receive any award or contract or any part thereof" when, *inter alia*, the Small Business Administration and the procuring agency find that it would "be in the interest of assuring that a fair proportion of the total [government] purchases and contracts * * * in each industry category are placed with small-business concerns." 15 U.S.C. 644(a).

FAR Part 19 regulates small-business contracting preferences. The "Rule of Two" is the primary test for considering whether to restrict competition to small businesses in soliciting and awarding a particular new contract. When that Rule applies, the contracting officer "shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that": (1) "Offers will be obtained from at least two responsible small business concerns"; and (2) "Award will be made at fair market prices." 48 C.F.R. 19.502-2(b). "Each contract" between $3000 and $150,000 also "shall be reserved exclusively for small-business concerns," unless the contracting officer is unable to obtain offers from two or more small businesses that are competitive in terms of price, quality, and delivery. 15 U.S.C. 644(j)(1); see 41 U.S.C. 1908 (inflation adjustment); 48 C.F.R. 19.502-2(a).

Set-asides are conducted via the procedures for awarding a new contract on the open market: through simplified acquisition procedures, sealed bidding, or contracting by negotiation. 48 C.F.R. 19.502-4(a); see 7 John Cosgrove McBride, *Government Contracts* § 48.140[1] (2012). Part 19 exempts from set-aside

requirements all awards below $3000 and "purchases from required sources of supply under Part 8 (*e.g.*, * * * [FSS] contracts)." 48 C.F.R. 19.502-1(b); see 15 U.S.C. 644(j).

Congress has also enacted a series of socioeconomic contracting preferences modeled on Section 15 of the Small Business Act and on the FAR's "Rule of Two." Congress has created preferences for awarding contracts to small businesses owned by socially and economically disadvantaged individuals, 15 U.S.C. 637(a); small businesses owned by women, 15 U.S.C. 637(m); small businesses in historically underutilized business zones (HUBZone businesses), 15 U.S.C. 657a; and small businesses owned and controlled by veterans with service-connected disabilities (SDVOSBs), 15 U.S.C. 657f. Each of these programs has annual goals, and each agency's goal must represent its "maximum practicable opportunity." 15 U.S.C. 644(g)(1)(A)(ii)-(v) and (B).

Contracting officers have discretion whether to apply these socioeconomic programs when awarding a new contract on the open market. 48 C.F.R. 6.204-6.207. There is no order of precedence among the socioeconomic programs. 48 C.F.R. 19.203(a).

4. Congress has not enacted an overarching statute indicating the order of priority among the many different procurement sources and authorities. For 36 years, regulations (and the FAR since its inception) have filled that gap. See 48 C.F.R. 8.002, 8.003; 44 Fed. Reg. 47,934-47,935 (Aug. 16, 1979); see also 48 C.F.R. 8.001(a) (1984). The regulations provide that, except when a specific-source rule (such as the requirement that the GPO be used for printing) applies, or as otherwise provided by law, agencies "shall"

follow a stated order of priority. 48 C.F.R. 8.002(a), 8.003. At all times relevant to the disposition of this case, the order of priority for supplies was (1) agency inventories; (2) excess from other agencies; (3) from Federal Prison Industries; (4) via the AbilityOne program; (5) via wholesale supply sources, such as GSA stock programs; (6) via mandatory-use FSS schedules; (7) via optional-use FSS schedules; and (8) from commercial sources on the open market. 48 C.F.R. 8.002(a)(1). For services, the order was (1) via the AbilityOne program; (2) via mandatory-use FSS schedules; (3) via optional-use FSS schedules; and (4) from commercial sources on the open market or via Federal Prison Industries. 48 C.F.R. 8.002(a)(2). Procurement under the FSS program accordingly had priority over awarding new contracts to commercial sources on the open market.[3]

When GSA awards a new FSS schedule contract, it follows the procedural requirements for soliciting and awarding new contracts on the open market. See 48 C.F.R. 38.101(e) ("The requirements of [FAR Parts] 5, 6, and 19 apply at the acquisition planning stage prior to issuing the schedule solicitation."). Once GSA has awarded a schedule contract, however, those same procedures are not repeated each time an agency places an order under the pre-existing FSS contract.

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[3] For years, virtually all FSS schedules have been optional. See *FSS Contracting* 48, 54 n.37. After the procurement here, the government-wide list in FAR Part 8 was revised and "mandatory use" schedules were deleted. See 78 Fed. Reg. 80,378 (Dec. 31, 2013). Agencies still can place FSS orders without awarding a new contract on the open market. *Ibid.*; see *id.* at 80,377 ("Agencies are encouraged to consider existing vehicles prior to awarding new contracts."). Some Department of Veterans Affairs FSS schedules remain mandatory. See 48 C.F.R. 808.002(a)(3) (2014).

In particular, agencies have long been able to place FSS orders without applying small-business contracting preferences. Under the order of priority FAR Part 8 establishes (see pp. 9-10, *supra*), procurement from or through government sources—including optional-use and mandatory-use FSS schedules—takes precedence over awarding new contracts to commercial sources on the open market, and contracting officers who place FSS orders therefore turn to Part 8's procedures governing that process. See 48 C.F.R. 8.002(a).

The FAR provisions governing the FSS program state that, subject only to exceptions that are inapplicable here, FAR Parts 13, 14, 15, and 19—*i.e.*, the procedures for soliciting and awarding new contracts on the open market, including small-business contracting preferences—"do not apply to * * * orders placed against [FSS] contracts." 48 C.F.R. 8.404(a). When "placing orders under [FSS] contracts," contracting officers "shall not seek competition outside of the [FSS] or synopsize the requirement" and need not "make a separate determination of fair and reasonable pricing." 48 C.F.R. 8.404(a) and (d); see 48 C.F.R. 8.405-5(a) ("the mandatory preference programs of Part 19 do not apply [to] orders placed against schedule contracts"). Part 19 exempts "purchases from required sources of supply under Part 8" from set-aside requirements, and gives "[FSS] contracts" as an example of such a source. 48 C.F.R. 19.502-1(b). FAR Part 8 is titled "required sources of supplies and services," and it includes procedures for ordering from mandatory-use and optional-use FSS schedules. 48 C.F.R. Pt. 8 (capitalization omitted); see 48 C.F.R. 8.405. And Part 38, which regulates awards of new

schedule contracts, provides that "[t]he requirements of parts 5, 6, and 19" generally "do not apply to orders * * * placed under [FSS] schedule contracts," with exceptions that are inapplicable here. 48 C.F.R. 38.101(e). Agencies thus can place FSS orders without applying small-business contracting preferences.

When placing FSS orders, agencies "should consider" at least one small business in the socioeconomic categories described above if such a vendor has previously been awarded an FSS contract under the relevant schedule. 48 C.F.R. 8.405-5(b). Agencies also "should give preference" to ordering from small businesses "when two or more items at the same delivered price will satisfy the requirement." 48 C.F.R. 8.405-5(c).

In 2010, Congress required the promulgation of federal regulations to permit the GSA to set aside FSS schedule contracts and to "establish guidance under which Federal agencies may, at their discretion * * * set aside orders placed against [FSS] contracts for small business concerns." Small Business Jobs Act of 2010 (2010 Jobs Act), Pub. L. No. 111-240, § 1331, 124 Stat. 2541 (15 U.S.C. 644(r)). FAR Part 8 now provides that, "[a]lthough the preference programs of part 19 are not mandatory" when using the FSS, contracting officers "may" "[s]et aside [FSS] orders" for small-business concerns. 48 C.F.R. 8.405-5(a) (2014); see 48 C.F.R. 19.502-4(c) (2014) (indicating that discretionary FSS set-asides are the only set-aside mechanism for "orders placed under the [FSS] Program"). GSA reports that, in fiscal year 2012, approximately 80% of FSS contractors were small businesses, and 36% of FSS spending went to small businesses. See *GSA Vendor FAQ*.

B. The Department Of Veterans Affairs

The mission of the Department of Veterans Affairs (VA) is to provide benefits and care to our Nation's veterans, their families, and their survivors. 38 U.S.C. 301(b). The VA runs the largest integrated health care system in the Nation, providing care to more than 8 million veterans annually. Veterans Health Admin., *About VHA*, http://www.va.gov/health/aboutVHA.asp (last visited Sept. 28, 2015). The VA reported that, in fiscal year 2012, it purchased $17.52 billion worth of medical equipment and other supplies and services. *Small Business Goaling Report, Fiscal Year 2012*, at 1 (Mar. 19, 2013), https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2012.pdf (*2012 Goaling Report*).

The VA issues regulations, known as the VA Acquisition Regulation (VAAR), that implement and supplement the FAR. 48 C.F.R. 801.000, 801.101(b); see 48 C.F.R. 1.101 ("The Federal Acquisition Regulations System consists of the [FAR], which is the primary document, and agency acquisition regulations that implement or supplement the FAR."). VAAR part numbers start at 801 and correspond to the FAR parts they build upon. See 48 C.F.R. 1.303(a) (establishing numbering scheme). Thus, Part 801 builds upon Part 1, Part 802 builds upon Part 2, and so on.

GSA has delegated to the VA authority to administer FSS schedules. See 48 C.F.R. 8.401, 808.402. The VA has nine FSS schedules, including for medical and surgical equipment and supplies, pharmaceuticals, professional health care and staffing services, and laboratory testing and analysis services. Office of Acquisition & Logistics, *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp (last

visited Sept. 28, 2015). The VA encourages veteran-owned small businesses to participate in the FSS program. J.A. 9.

"[I]n 2011, the VA used FSS contracts for 20% of its total [procurement] spending, and 13% of these FSS expenditures went" to veteran-owned small businesses. Pet. App. 4a. The VA stated in 2009 that, by number of transactions, it "purchases approximately 60 percent of its goods and services through the FSS." 74 Fed. Reg. 64,624 (Dec. 8, 2009). The VA reported that, in fiscal year 2009, it entered into approximately 230,000 total transactions. *Small Business Goaling Report, Fiscal Year 2009*, at 1, https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2009.pdf (last visited Sept. 28, 2015) (*2009 Goaling Report*).

C. The 2006 Veterans Act And The VA's Regulations

1. The 2006 Veterans Act created a targeted program specifically for the VA to contract with veteran-owned small businesses. See 38 U.S.C. 8127, 8128. Congress enacted this program in response to the government's failure, notwithstanding the government-wide contracting preference in 15 U.S.C. 657f, to meet its goals for contracting with SDVOSBs. See H.R. Rep. No. 592, 109th Cong., 2d Sess. 15-16 (2006).

Section 8127 of Title 38 is modeled on prior small-business contracting-preference statutes, and it incorporates the Rule of Two. Subsection (a) requires the VA Secretary to set annual goals for contracting with small businesses owned and controlled by any veteran (VOSBs), as well as goals for SDVOSBs specifically. 38 U.S.C. 8127(a)(1). The Secretary's goal for SDVOSBs must meet or exceed the current government-wide goal, which itself must meet or

exceed three percent. 38 U.S.C. 8127(a)(3); see 15 U.S.C. 644(g)(1)(A)(ii). No other agency has a goal (or contracting preferences) for VOSBs.

Subsections (b), (c), and (d) of Section 8127 establish contracting preferences for "purposes of meeting the goals under subsection (a)." 38 U.S.C. 8127(b), (c), and (d). Subsection (d) incorporates the Rule of Two and states:

> Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer * * * shall award contracts on the basis of competition restricted to [VOSBs or SDVOSBs] if the contracting officer has a reasonable expectation that two or more [VOSBs or SDVOSBs] will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

38 U.S.C. 8127(d).

Subsections (b) and (c) allow the VA to award sole-source contracts below certain dollar thresholds. A VA contracting officer "may" use "other than competitive procedures" (*e.g.*, sole-source awards) to "enter[] into a contract" with a VOSB or SDVOSB if the amount is less than the simplified acquisition threshold ($150,000). 38 U.S.C. 8127(b). A contracting officer also "may award a contract" on a sole-source basis to a VOSB or SDVOSB, provided that the anticipated price will be between $150,000 and $5 million and the officer determines that the recipient is a "responsible source" and that "the contract award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. 8127(c).

Subsection (e) provides that "[a] small business concern may be awarded a contract under this section" only if it is listed in a VA database. 38 U.S.C. 8127(e). Subsections (f), (g), and (h) require the VA to verify that a business is, in fact, a VOSB or SDVOSB before listing it in the database; impose penalties for misrepresentations; and address the treatment of a business after the death of a veteran owner. 38 U.S.C. 8127(f)-(h). As of September 28, 2015, the database listed 7332 verified VOSBs, including 5544 SDVOSBs. VA, *Vendor Information Pages*, http://www.vip.vetbiz.gov/ (last visited Sept. 28, 2015).

Subsection (i) directs that "[p]references for awarding contracts to small business concerns shall be applied in the following order of priority": (1) contracts awarded under Section 8127 to SDVOSBs; (2) contracts awarded under Section 8127 to VOSBs; (3) contracts awarded under the preferences for HUBZone businesses or for small businesses owned by socially and economically disadvantaged individuals; and (4) "[c]ontracts awarded pursuant to any other small business contracting preference." 38 U.S.C. 8127(i). If after December 31, 2008, the VA contracts with another agency to acquire goods or services, that agency must agree to comply with Section 8127 "to the maximum extent feasible." 38 U.S.C. 8127(j). And when the VA is procuring "pursuant to [another] contracting preference," the VA "shall give priority" to any VOSB or SDVOSB "if [it] also meets the requirements of that contracting preference." 38 U.S.C. 8128(a).

2. VA regulations implement Section 8127(d). They provide:

> The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,
>
> (1) Offers will be received from two or more eligible SDVOSB concerns; and
>
> (2) Award will be made at a fair and reasonable price.

48 C.F.R. 819.7005(a); see 48 C.F.R. 819.7006(a) (same for VOSBs). Sections 813.106, 819.7007, and 819.7008 address optional sole-source procedures. See 48 C.F.R. 813.106, 819.7007, 819.7008.

The VA's regulations do not depart from the FAR's government-wide rule that procurement from or through government sources (including the FSS) has priority over soliciting and awarding a new contract on the open market. Compare 48 C.F.R. 808.002(a), with 48 C.F.R. 8.002(a). The VA's regulations also do not depart from the FAR's rule that orders placed under pre-existing FSS contracts are exempt from Part 19's small-business contracting requirements. Compare 48 C.F.R. 808.405-2, 819.7005, 819.7006, with 48 C.F.R. 8.404(a), 8.405-2, 8.405-5(a), 19.502-1(b). In promulgating its regulations, the VA explained that "FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders. VA has no authority to include set-aside procedures for FSS orders under this rule." 74 Fed. Reg. at 64,624; see *ibid.* ("[P]art 8 procedures

in the FAR will continue to apply to VA FSS task/delivery orders."); *ibid.* ("[S]et-asides do not apply to FAR part 8 FSS acquisitions.").

The VA's regulations instead provide an additional substantive preference for VOSBs when the agency places FSS orders. When the VA places an FSS order with a statement of work and evaluation factors other than price, the contracting officer "shall" provide additional consideration to VOSBs and businesses that will subcontract with VOSBs. 48 C.F.R. 808.405-2, 815.304, 815.304-70. That requirement, however, addresses the contracting officer's choice among FSS vendors; it does not address the decision whether to utilize the FSS for a particular procurement.

D. Facts And Procedural History

In early 2012, the VA decided to procure an Emergency Notification Service (ENS) for four VA medical centers and associated outpatient clinics. J.A. 30. An ENS "rapidly deliver[s] messages to VA personnel with critical information and notices in an emergency situation, such as a natural disaster." *Ibid.* The VA sought ENS services until implementation of a new VA-wide ENS system, which was expected to begin later in 2012. *Ibid.* The contracting officer decided to use an optional-use FSS schedule, and awarded a task order to a business that was not a VOSB. J.A. 30-31. The task order was for $33,824.10 for one year, with options to extend it for two more years. J.A. 31. The maximum contract amount, including options, was $101,472.30. *Ibid.*

Petitioner is a verified SDVOSB. J.A. 33. On March 14, 2012, petitioner filed a bid protest with the Government Accountability Office (GAO). J.A. 31; see 31 U.S.C. 3552(a). Petitioner alleged that the VA had

violated Section 8127 by using the FSS without first determining whether two or more VOSBs could perform the contract at a fair and reasonable price and, if so, soliciting and awarding a contract on the basis of competition restricted to VOSBs. Pet. App. 10a. Relying on its prior decision in *Aldevra*, B-406205, 2012 CPD ¶ 112 (Comp. Gen. Mar. 14, 2012), the GAO sustained the protest and rejected the VA's argument that it "need not consider SDVOSB and VOSB set-asides prior to determining whether to purchase goods or services through the FSS program." J.A. 17, 19. As in *Aldevra*, the VA advised petitioner that it would not follow the GAO's non-binding recommendation. J.A. 11-12, 32; see *Honeywell, Inc.* v. *United States*, 870 F.2d 644, 647-648 (Fed. Cir. 1989).

Petitioner filed a bid protest complaint in the United States Court of Federal Claims (CFC), see 28 U.S.C. 1491(b)(1), which granted summary judgment to the government. Pet. App. 33a-71a. The CFC stated that the question in the case was "whether Congress intended that VA retain its discretion to procure goods and services from the FSS, in light of the set-aside procedures set forth in" Section 8127. *Id.* at 34a-35a. The CFC found Section 8127 ambiguous as to whether it altered the "historic exception of the FSS from small business set-asides," *id.* at 63a, and it deferred to the VA's statement in the preamble to the final regulations that Section 8127's procedures "do[] not apply to FSS task or delivery orders," *id.* at 68a (brackets in original) (quoting 74 Fed. Reg. at 64,624).

The court of appeals affirmed. Pet. App. 1a-21a. The court explained that requiring the VA to follow Section 8127 procedures in all cases, without regard to

the Secretary's goals, would "read[] the words 'for purposes of meeting the goals under subsection (a)' out of the statute" and would "make[] the mandatory goal-setting statutory provision [in subsection (a)] unnecessary." *Id.* at 20a. The court stated that "[t]he correct reading of the statute according to its plain meaning puts the 'shall' in subsection (d) in harmonious context with the discretionary 'may' provisions of subsections (b) and (c)," and "assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." *Ibid.* The court concluded that "[t]he mandate is, therefore, the required procedure for meeting these goals" and that the VA "need not perform a VOSB Rule of Two analysis for every contract, as long as the goals set under subsection (a) are met." *Ibid.*

Judge Reyna dissented. Pet. App. 22a-32a. He concluded that Section 8127 unambiguously requires the VA to apply Section 8127's procedures before procuring any goods or services from the FSS. *Id.* at 22a-23a.

SUMMARY OF ARGUMENT

The VA has correctly determined that 38 U.S.C. 8127 does not apply to the agency's placement of orders under pre-existing FSS contracts. At a minimum, the VA's interpretation is reasonable and warrants deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. Section 8127 was modeled on a series of prior small-business contracting preferences. See 15 U.S.C. 637(a), 637(m), 644(a), 644(j), 657a, 657f. All of those statutes used phrases like "awarding contracts" or "offering contracts" to describe the agency decisions to which the statutes applied. See *ibid.* As petitioner

recognizes (Br. 9-10), the FAR has long reflected the understanding that those statutory small-business preferences apply when an agency solicits and awards new contracts on the open market, but not when the agency instead places orders under *pre-existing* government contracts.

Like the predecessor statutes on which it was modeled, Section 8127(d) applies by its terms only when the VA "award[s] contracts." 38 U.S.C. 8127(d). Like similar phrases in the forerunner statutes, that phrase is properly interpreted to mean that Section 8127(d) applies when the VA solicits and awards new contracts to commercial sources on the open market, but not when the VA places orders under pre-existing government contracts. Agencies spend tens of billions of dollars each year in task and delivery orders under FSS contracts, and billions more under similar contract vehicles. This method of procurement is vital to the VA's ability to provide benefits and care to veterans. The FSS program is advantageous to federal procurement officials largely because the procedures that apply when awarding a new contract on the open market need be completed only once, when the schedule contract is awarded, and need not be replicated each time a new order is placed.

Petitioner's expansive interpretation of Section 8127(d) would mark a radical departure from past practice and could seriously impede the VA's efforts to provide high-quality care to veterans. Under petitioner's interpretation, the VA could not use long-standing systems and procedures to swiftly purchase prescription drugs, medical or surgical supplies, laboratory services, or mundane items like griddles or food slicers. Rather, the agency would first be re-

quired to perform market research to determine whether the Rule of Two is satisfied. And if the Rule of Two were satisfied, the VA would be required to follow the procedures for soliciting and awarding a wholly new contract in every instance, even when a pre-existing government contract fulfills the same need. That approach would create waste and add red tape and delay to the VA's efforts to provide benefits and services to veterans. And it would provide only limited and uncertain advantages to VOSBs, who already earn a significant share of VA dollars spent under the FSS.

B. At a minimum, the VA's interpretation of Section 8127(d) is reasonable and warrants *Chevron* deference. Nothing in Section 8127(d)'s text suggests, let alone unambiguously establishes, that Congress intended to depart from the understanding that small-business preferences apply to the award of new government contracts, not to the placement of orders under pre-existing government contracts. The VA acted reasonably in construing Section 8127 in a manner consistent with a long string of prior laws, and in rejecting an alternative construction that would entail both a sharp break with past practice and serious practical disruption.

Petitioner contends that, because the VA's regulations implementing Section 8127(d) do not refer to the SDVOSB and VOSB contracting goals that the Secretary is required to establish, those regulations require the agency to apply Section 8127's contracting preference in *all* procurements, including orders placed under pre-existing FSS contracts. That is incorrect. The VA's regulations require agency contracting officers to apply Section 8127 procedures whenever they

solicit and award new contracts to commercial sources on the open market, even if the VA is achieving the Secretary's goals for the relevant year. The VA thereby maximized the opportunities available to VOSBs in that important context. But the VA did not take the further step of requiring its contracting officers to apply these same procedures before placing orders under pre-existing FSS contracts. Regulations in the FAR carry meaning not only through what they say, but also by where they say it. See 48 C.F.R. 1.303(a). By codifying its regulations in Parts 808 and 819 of the FAR, the VA plugged those regulations into FAR Parts 8 and 19, which establish the government-wide rule that agencies may place FSS orders without applying small-business contracting preferences.

ARGUMENT

THE VA CAN PLACE ORDERS UNDER PRE-EXISTING FSS CONTRACTS WITHOUT APPLYING SECTION 8127'S PREFERENCE FOR AWARDING NEW CONTRACTS

A. Section 8127 Does Not Override The VA's Ability To Place FSS Orders Without Applying Small-Business Contracting Preferences

The task of interpreting Section 8127 begins "with the language of the statute," *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989), construed "in accord with its ordinary or natural meaning," *Smith* v. *United States*, 508 U.S. 223, 228 (1993). "[O]ftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). Accordingly, this Court "must read the words 'in their context and

with a view to their place in the overall statutory scheme.'" *Ibid.* (citation omitted); see *Graham Cnty. Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 290 (2010) ("Courts have a duty to construe statutes, not isolated provisions.") (citation and internal quotation marks omitted).

1. Section 8127(d) imposes a mandate

Subsection (d) of Section 8127 states that, "[e]xcept as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section," a VA contracting officer "*shall* award contracts on the basis of competition restricted to" VOSBs if the Rule of Two is satisfied. 38 U.S.C. 8127(d) (emphasis added). Subsections (b) and (c), by contrast, establish discretionary procedures ("*may* use" and "*may* award") for awarding sole-source contracts below specified dollar thresholds. 38 U.S.C. 8127(b) and (c) (emphases added). The contrast with that permissive language confirms the natural inference that the word "shall" in subsection (d) is mandatory.

The disputed question in this case concerns *when* Section 8127(d)'s Rule of Two mandate applies. On its face, Section 8127(i) requires the VA to give the Section 8127(d) contracting preference priority over any other small-business contracting preference. 38 U.S.C. 8127(i)(1) and (2). Section 8127(i) thus eliminates the discretion to choose among socioeconomic contracting preferences that the VA had previously possessed. Cf. 48 C.F.R. 19.203(a)-(c). The range of options available to VA contracting officers also does not depend on whether the agency is achieving its SDVOSB and VOSB contracting goals for the relevant year. See 48 C.F.R. 819.7005(a), 819.7006(a). Rather,

VA contracting officers must apply Section 8127's contracting preference whenever they solicit and award new contracts on the open market—*i.e.*, through simplified acquisition procedures, sealed bidding, or contracting by negotiation—even if it is clear that the Secretary's goals for a particular year will be achieved.[4] See *ibid.* And if the Rule of Two is satisfied, the VA must award the contract either on the basis of restricted competition or on a sole-source basis (if subsection (b) or (c) is satisfied as well). See 38 U.S.C. 8127(d).

In the procurement at issue here, however, the VA did not solicit and award a new contract on the open market. Rather, the agency placed an order under a *pre-existing* FSS contract. The only question in this case is whether the VA may place orders under pre-existing FSS contracts without first applying Section 8127's procedures for "award[ing] contracts." 38 U.S.C. 8127(d). For the reasons set forth below, the answer is yes.

2. Section 8127(d)'s text and context show that it does not apply when the VA places orders under pre-existing FSS government contracts

a. As petitioner recognizes (Br. 8-12), Congress modeled Section 8127 on a string of prior small-business contracting statutes. See 15 U.S.C. 637(a), 637(m), 644(a) 644(j), 657a, 657f. The natural inference is that, except to the extent that Section 8127 clearly indicates a contrary intent, Congress intended

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[4] The goals established by the Secretary pursuant to Section 8127(a) are not ceilings. The VA has certified that it exceeded its contracting goals in every year since the 2006 Veterans Act went into effect. Pet. App. 19a.

it to operate in the same way as the statutes on which it was modeled. Cf. *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013) ("[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.") (brackets in original) (quoting *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986)); *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998) ("[w]hen administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate" those interpretations).

In each of the predecessor statutes on which Section 8127 was modeled, Congress used a phrase like "award contracts" to describe when the preference applied. See 15 U.S.C. 637(a)(1)(D) ("contract opportunity offered for award"); 15 U.S.C. 637(m)(2) ("any contract"); 15 U.S.C. 644(j)(1) ("[e]ach contract * * * reserved"); 15 U.S.C. 657f(a) ("award a * * * contract"); 15 U.S.C. 657f(b) ("award contracts"); 15 U.S.C. 657a(b)(2)(A) (2006) ("award * * * contracts"); 15 U.S.C. 657a(b)(2)(B) (2006) ("contract opportunity * * * awarded"). In 2006, when Congress enacted Section 8127, the FAR had long treated those preferences as applicable when agencies solicited and awarded new contracts on the open market, *i.e.*, when an agency awarded a new contract via simplified acquisition procedures, sealed bidding, or contracting by negotiation. See, *e.g.*, 48 C.F.R. 19.502-4(a) (2006); 48 C.F.R. 19.502-4(a) (1986).

As petitioner recognizes (Br. 9-10), however, the FAR had also long reflected the understanding that those preferences do *not* apply when agencies place orders under pre-existing FSS government contracts (or when agencies procure goods from other government sources). See 48 C.F.R. 8.002(a), 8.404(a); 48 C.F.R. 8.001(a), 8.404(a) (1986); see also pp. 10-12, *supra* (detailing regulations); Pet. App. 38a. To be sure, a new procurement under a pre-existing agreement creates further contractual obligations. See *Lanier Bus. Prods.*, B-187969, 77-1 CPD ¶ 336, at 4 (Comp. Gen. May 11, 1977). A contracting officer's issuance of a task order under a pre-existing FSS contract therefore could reasonably be described for other purposes as the formation of a "contract." Cf. J.A. 31. The statutory and regulatory backdrop against which Section 8127(d) was enacted, however, strongly suggests that Congress used the term "award contracts" in a more limited sense here.

The term of art for procurement under the FSS and other indefinite-delivery vehicles is that the agency places "orders" under a pre-existing government "contract." See, *e.g.*, Pet. Br. 9, 10, 17, 18, 48, 49; see also 48 C.F.R. 2.101 ("*Delivery order* means an order for supplies placed against an established contract or with Government sources."); *ibid.* ("*Task order*" has same meaning for services); 48 C.F.R. 8.401 ("place orders * * * against [FSS] contracts."); 48 C.F.R. 8.404(a) and (b)(1) ("orders placed against [FSS] contracts"; "placing orders under [FSS] contracts"; "when placing an order"); 48 C.F.R. 8.404(c), (d), and (e) ("[o]rders placed under a[n] [FSS] contract"; "placing an order against a schedule contract"; "issuance of an order * * * against a schedule contract");

48 C.F.R. 8.405-5(b) (2014) ("[o]rders placed against schedule contracts"); 48 C.F.R 38.101(c) and (e) ("may issue orders under the schedules"; "orders * * * placed under resulting schedule contracts").[5] Congress has also consistently used words like "orders" when referring to agency purchases under pre-existing FSS contracts or other indefinite-delivery vehicles. See, *e.g.*, 41 U.S.C. 3302 (competition requirements for "task order[s]" or "delivery order[s]" under multiple award contracts); 41 U.S.C. 4101 (defining task and delivery order contracts as contracts that "provide[] for the issuance of orders"); 41 U.S.C. 4104(c)(2) ("ordering and program practices" under indefinite-delivery contracts); 41 U.S.C. 4106(b) (procedures for "issuance of a task or delivery order under a task or delivery order contract").

The statutory language that Congress used in 2010, when it first empowered agencies to set aside FSS procurements for small businesses, is particularly striking. Congress directed that regulations be promulgated to "establish guidance under which Federal agencies may, at their discretion * * * set aside orders placed against multiple award contracts for small business concerns." 15 U.S.C. 644(r)(2). That provision uses the term "contracts" to describe the overall FSS schedule agreements, and the term "orders" to

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[5] See also *Bridges Sys. Integration, LLC*, B-411020, 2015 CPD ¶ 144, at 5-6 (Comp. Gen. Apr. 23, 2015) ("The issuance of task orders under the FSS contract is not the same thing as awarding the FSS contract under which orders are issued."); *Black's Law Dictionary* 398 (10th ed. 2014) ("When exercising its contractual rights, the government issues task orders to specify the product or service requirements, which may vary with each order."); *FSS Contracting* 41 ("Once GSA issues a[n] [FSS] contract, the buying agencies order directly from the vendor.").

describe individual procurements under pre-existing FSS contracts. And unlike 15 U.S.C. 644(j), which *requires* the use of small-business set-asides for contracts within a particular dollar range (see pp. 34-36, *infra*), Section 644(r) does not mandate set-asides for any class of "orders placed against multiple award contracts." Rather, all FSS set-asides are discretionary. See 15 U.S.C. 644(r) ("may, at their discretion").

The distinction between the initial award of an FSS contract and the subsequent placement of orders under that contract is central to the FSS program. Set-asides and other procedures for soliciting and awarding new contracts—including detailed regulations in Parts 5, 6, 13, 14, 15, and 19 of the FAR—apply when the GSA or another agency awards new FSS schedule contracts. See 48 C.F.R. 8.404(a), 38.101(e). But "[w]hen placing an order under a schedule contract, the procuring agency is not required to seek further competition, synopsize the solicitation or award, or to determine separately fair and reasonable pricing, *since the planning, solicitation, and award phases of the FSS comply with FAR requirements.*" *Card Tech. Corp.*, B-275385, 97-1 CPD ¶ 76, at 2 (Comp. Gen. Feb. 18, 1997) (emphasis added); see 48 C.F.R. 8.404(a) (procedural requirements for new contracts generally do not apply to FSS orders); 48 C.F.R. 38.101(e) (same); see also 48 C.F.R. 16.505(a)(1) (similar for orders under other indefinite-delivery contracts). Indeed, if the requirements for awarding new contracts applied every time an agency placed an FSS order, the FSS would hardly be a "simplified process," 48 C.F.R. 8.402(a), and its *raison d'être* would be destroyed.

b. Like the predecessor statutes on which it was modeled, Section 8127 refers solely to awarding or entering into contracts. See 38 U.S.C. 8127(b) ("entering into a contract"); 38 U.S.C. 8127(c) ("award a contract"); 38 U.S.C. 8127(d) ("award contracts"); 38 U.S.C. 8127(i) ("priority for contracting preferences"; "[p]references for awarding contracts"; "[c]ontracts awarded pursuant to subsection (b), (c), or (d)"; "[c]ontracts awarded pursuant to" other small-business "contracting preference[s]").

The fact that Section 8127(d) applies by its terms when the VA "award[s] contracts," and does not refer to "orders," the FSS, or broader terms like "procurement," reinforces the inference that Congress intended for Section 8127 to operate in the same fundamental way as the prior small-business contracting preferences upon which it was modeled. Section 8127(d)'s contracting preference thus applies when the VA solicits and awards contracts on the open market through sealed bidding, negotiated contracting, or simplified acquisition procedures. It does not apply when the VA places orders under pre-existing government contracts, including the FSS contract at issue in this case.

Section 8127's placement within VA-specific procurement law reinforces the inference. In the two sections of Title 38 that immediately precede Section 8127, Congress expressly contemplated that the VA would use the FSS. Section 8125 generally prohibits the VA from entering into local contracts for items listed in certain VA FSS schedules. 38 U.S.C. 8125(a) and (e)(1). Section 8125 thus often requires the VA to use national contracts or FSS orders for those items. And Section 8126 requires certain prescription drugs

to be listed on VA FSS schedules. 38 U.S.C. 8126(a)(1). It is unlikely that, after contemplating in two consecutive sections that the VA would use the FSS, Congress would sharply restrict the VA's ability to use the FSS in the very next section—without mentioning the FSS at all.[6]

3. Section 8127's structure confirms that the VA does not "award contracts" within the meaning of Section 8127(d) when it places FSS orders

Subsection (a) of Section 8127 directs the Secretary to establish goals for contracting with SDVOSBs and VOSBs. Each of the next three subsections states that specified contracting preferences should be used for "purposes of meeting the goals under subsection (a)." 38 U.S.C. 8127(b)-(d). As the VA's regulations implement the statute, the goals are significant. With respect to any particular procurement, a VA contracting officer can make a meaningful and informed choice between placing an order under the FSS or a similar indefinite-delivery contract, on the one hand, and soliciting and awarding a wholly new contract on the open market, on the other. See 48 C.F.R. 8.002(a), 808.002(a); see also pp. 47-50, *infra*. Agencies generally have broad discretion to decide whether to use the FSS or to solicit and award a new contract on the open

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[6] Congress has considered but has not enacted amendments to Section 8127 to address the FSS. See H.R. 4048, 112th Cong., 2d Sess. 2 (2012); H.R. 2416, 111th Cong., 1st Sess. 2 (2009). Congress's refusal "to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

market. See Pet. App. 38a; see also *Tyler Constr. Grp.* v. *United States*, 570 F.3d 1329, 1334 (Fed. Cir. 2009) (agencies have "broad discretion to determine what particular method of procurement will be in the best interests of the United States in a particular situation"). In exercising that discretion, the contracting officer can consider, *inter alia*, the time and expense that each approach can be expected to entail; the likely impact of each alternative approach on the achievement of the Secretary's goals for VOSBs; and the likely impact on achievement of the VA's other small-business contracting goals. See 15 U.S.C. 644(g)(1)(B) (other goals); 48 C.F.R. 17.502-1(a)(2) (identifying considerations that can inform the decision whether to procure under pre-existing contracts). As the court of appeals recognized, preserving a role for discretion "assures that the goals of subsection (a) will be set by the Secretary, not the success or failure of the Rule of Two in the marketplace." Pet. App. 20a.

By contrast, petitioner's interpretation renders the Secretary's discretion to set goals insignificant or irrelevant. See Pet. App. 19a-20a. On petitioner's view, subsections (b), (c), or (d) must be applied across-the-board in every VA procurement. Under that approach, the specific goals established by the Secretary would have virtually no bearing on the VA's balancing of competing agency interests or on its ultimate choice, in any particular procurement, among the alternative methods described above. Whether the goals are satisfied instead would depend on marketplace conditions that have nothing to do with the Secretary's goals and are outside the VA's control. See Pet. App. 19a-20a. That understanding is inconsistent with the obvious inference that the "goals"

established by the Secretary pursuant to subsection (a) are intended to guide the agency's behavior. See *Webster's Third New International Dictionary* 972 (1993) (a "goal" is "the end toward which effort or ambition is directed: aim, purpose").

Subsection (i)'s command that the VA must consider veterans first before "other small business contracting preference[s]," 38 U.S.C. 8127(i), also weighs heavily against petitioner's view that the VA must consider veterans first "before turning to other sources of supply," Pet. Br. 26-27; see *id.* at 28-29. If subsection (d) had priority over procurement from all other sources of supply, Section 8127(i)'s narrower directive that SDVOSBs and VOSBs have priority over other small businesses would serve no evident purpose. And it would be anomalous for Congress to describe Section 8127 as a "[p]referenc[e] for awarding contracts to small business concerns," and to include it among "other small business contracting preference[s]," 38 U.S.C. 8127(i), if Section 8127 was a new species of favoritism that operated in a fundamentally different manner than any "other small business contracting preference," *ibid.*; cf. *Logan* v. *United States*, 552 U.S. 23, 31 (2007) ("Words in a list are generally known by the company they keep.").

4. The FAR's prior treatment of similarly mandatory contracting preferences confirms that the VA retains its authority to place FSS orders without applying contracting preferences for SDVOSBs and VOSBs

Petitioner contends (Br. 10, 14-15) that the 2006 Veterans Act is unique among small-business contracting preferences because Section 8127(d) uses the word "shall," whereas the other statutes "are express-

ly discretionary, not mandatory." As explained above, however, the word "shall" makes clear that subsection (d)'s Rule of Two is mandatory, but does not explain when that Rule must apply. 38 U.S.C. 8127(d). Except when the VA chooses to conduct a sole-source procurement under Section 8127(b) or (c), the agency must apply the Rule of Two whenever it "award[s] contracts." See *ibid.*; 48 C.F.R. 819.7005(a), 819.7006(a). But neither the word "shall" nor any other language requires, or even suggests, that the VA should be viewed as "award[ing] contracts" within the meaning of Section 8127(d) when it places orders under pre-existing government contracts. Rather, like the provisions on which it was modeled, Section 8127(d) applies only when the VA solicits and awards new contracts on the open market.

Petitioner also overlooks other small-business contracting-preference statutes with the word "shall." Most significantly, 15 U.S.C. 644(j) provides that "[e]ach contract" between $3000 and $150,000 "*shall* be reserved exclusively for small business concerns," unless "the contracting officer is unable to obtain" competitive offers from two or more small businesses. 15 U.S.C. 644(j)(1) (emphasis added); see 41 U.S.C. 1908 (inflation adjustment to statutory dollar range). And in 2006, when Congress enacted Section 8127, the preference for HUBZone businesses similarly provided that, "[n]otwithstanding any other provision of law * * * a contract opportunity *shall be awarded* pursuant to this section" on the basis of restricted competition if the Rule of Two is satisfied. 15 U.S.C. 657a(b)(2)(B) (2006) (emphasis added).[7]

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[7] In 2010, the CFC interpreted the phrase "[n]otwithstanding any other provision of law" to give the HUBZone program priority

As petitioner recognizes (Br. 9-10), the FAR has long reflected the understanding that the government may procure goods from or through the FSS and other government sources, without applying the small-business contracting preferences on which Section 8127 was modeled. See pp. 10-12, *supra* (collecting FAR provisions). The longstanding flexibility afforded federal agencies to place FSS orders without applying small-business contracting preferences has had great practical significance. Both Section 644(j) and the HUBZone preference apply government-wide, not merely to one agency. Section 644(j) applies to relatively small-dollar purchases, which are the FSS's heartland. And Section 644(j) has imposed the same basic "[e]ach contract * * * shall be reserved" mandate since Congress enacted it in 1978. See Act of Oct. 24, 1978, Pub. L. No. 95-507, § 221, 92 Stat. 1771.

Agencies have thus relied on the understanding of those provisions that is reflected in the FAR to purchase billions of dollars worth of goods and services via the FSS, in countless transactions over the span of

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over other socioeconomic contracting preferences, contrary to the government's interpretation. See *DGR Assocs., Inc.* v. *United States*, 94 Fed. Cl. 189, 206 (2010); Office of Legal Counsel, *Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs*, 2009 WL 2870163, at *4-*5 (Aug. 21, 2009). Congress responded by deleting the "[n]otwithstanding" language and changing "shall" to "may," effectively overruling the CFC's decision and adopting the government's position. 2010 Jobs Act § 1347(b)(1) and (c)(1), 124 Stat. 2547. In Section 8127, Congress resolved this ambiguity for purposes of VA contracting by enacting an explicit order of priority among small-business contracting preferences. 38 U.S.C. 8127(i).

37 years, without applying the Rule of Two or soliciting and awarding new contracts when that Rule was satisfied. Congress also amended Section 644(j) in 1994, after 16 years of government-wide practice under that statute, without altering the command that "[e]ach contract" within a specified dollar range "shall" be presumptively reserved for small businesses. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 4004, 108 Stat. 3338. The 1994 amendment did not suggest that Congress was dissatisfied with the FAR provisions that treated Section 644(j) as inapplicable to the placement of orders under pre-existing FSS contracts. *E.g.*, 48 C.F.R. 8.404(a) (1994).

In 2010, when Congress first created a small-business preference that applied to FSS orders, it referred specifically to "orders placed against multiple award contracts." 15 U.S.C. 644(r)(2). The Senate Report explained that "[t]he Small Business Act and the [FAR] require Federal agencies to set contracts aside for small businesses if there is a reasonable expectation that two or more small businesses would submit bids at reasonable prices. *However, these general set-aside requirements have been interpreted not to apply to multiple-award contracts.*" 2010 Senate Report 7 (emphasis added). Rather than rejecting that view of existing law, Congress mandated the promulgation of regulations that would allow agencies, "at their discretion," to use small-business set-asides when placing orders under FSS contracts. 15 U.S.C. 644(r); see p. 28, *supra*. Section 644(r) thus strongly reinforces the conclusion that the mandatory set-aside established by Section 644(j) does not apply to FSS

orders—and that Section 8127 is similarly inapplicable.[8]

The broader historical context further reinforces the point. When Congress first enacted Section 644(j) in 1978, it had already been established practice for nearly twenty years under federal regulations that small-business set-aside requirements applied when soliciting and awarding new contracts. See 24 Fed. Reg. 3585 (May 5, 1959) (Department of Defense regulations to be codified at 32 C.F.R. 1.706-5(a) and (b)

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[8] Since 2007, the GSA and the Small Business Administration have taken conflicting positions over whether Section 644(j) applies to procurements conducted under pre-existing FSS contracts. See Letter from John W. Klein, Assoc. Gen. Counsel, Procurement Law, Small Business Admin., to Paula A. Williams, Office of Gen. Counsel, GAO (Aug. 21, 2015) (on file with the Office of the Solicitor General) (arguing that Section 644(j) applies in this context); Letter from Michael D. Tully, Senior Assistant Gen. Counsel, Personal Prop. Div., GSA, to Paula A. Williams, Office of Gen. Counsel, GAO (Sept. 16, 2015) (on file with the Office of the Solicitor General) (arguing that it does not). Acting in consultation with the Small Business Administration, the FAR Council previously rejected a request to amend the FAR to mandate small-business set-asides for FSS orders within Section 644(j)'s dollar range. See 69 Fed. Reg. 34,232 (June 18, 2004). The FAR Council promulgates the FAR and consists of the Secretary of Defense and the Administrators of GSA, NASA, and the Office of Federal Procurement Policy. 41 U.S.C. 1302(a)-(b), 1303(a)(1). The FAR Council explained that adoption of that proposal "would fundamentally alter the schedules program in terms of the efficiency and effectiveness of the overall program by increasing the administrative burden on agencies without having demonstrated that the change[] would, in fact, benefit small business over the long term." 69 Fed. Reg. at 34,232. This brief reflects the position of the United States, which is that Section 644(j), both historically and in its current form, does not apply to the placement of orders under pre-existing FSS contracts.

(Supp. 1960)); 41 C.F.R. 1-1.706-5(a) and (b) (1964) (same under civilian regulations); see also *J.H. Rutter Rex Mfg. Co.* v. *United States*, 706 F.2d 702, 705 (5th Cir.) (discussing history of Rule of Two), cert. denied, 464 U.S. 1008 (1983). And it was also already long-established that the procedures for placing FSS orders did *not* involve set-asides. See 32 C.F.R. 5.100-5.105 (Supp. 1960); 41 C.F.R. 101-26.401-1, 101-26.402-1 (1965). Instead, when placing FSS orders, agencies applied a substantive preference whereby, when all else was equal, an FSS order would be placed with a small business rather than a large one. See 41 C.F.R. 1-1.711, 101-26.408-4(b) (1968).

When enacting Section 644(j), Congress did not indicate an intent to break from this longstanding practice and to reach FSS orders. Congress instead chose to refer only to reserving "contract[s]." 15 U.S.C. 644(j). Congress subsequently enacted socioeconomic contracting preferences one by one, years apart, again using language like "awards contracts"—after the FAR had already made it clear that Section 644(j)'s contracting preference did not apply to FSS orders. See Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 303(b), 102 Stat. 3869 (adding a contracting preference for small businesses owned by socially and economically disadvantaged individuals); HUBZone Act of 1997, Pub. L. No. 105-135, § 602, 111 Stat. 2627 (HUBZone businesses); Small Business Programs Reauthorization Act of 2000, Pub. L. No. 106-554, App. I, § 811, 114 Stat. 2763A-708 (small businesses owned by women); Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 308, 117 Stat. 2662 (SDVOSBs). Congress has thus enacted contracting preferences on multiple occasions

over the span of decades, with ample opportunity to direct that these preferences apply when placing FSS orders. Yet Congress did not do so. This statutory and historical context strongly suggests that, as under the statutes on which Section 8127 was modeled, Section 8127's procedures for "award[ing] contracts" do not apply when the VA places orders under pre-existing FSS contracts.

5. Requiring the VA to apply Section 8127 before placing FSS orders would seriously impair the agency's ability to deliver high-quality care to veterans

a. The ability to place orders under the FSS is often essential to the VA's effective and expeditious performance of its obligations to veterans. If the VA needs more angioplasty stents, laparoscopes, critical-care beds, or surgical scrubs; if a mortuary freezer for preserving deceased veterans' remains is broken; if a VA hospital needs more laboratory analysis services; or if a VA hospital needs to fill temporary vacancies for cardiologists or nurses; then the VA can open a GSA website, check three listings or review three quotes, and select the one that provides the best value and lowest overall cost alternative. See 48 C.F.R. 8.405-1(c)-(d), 8.405-2(c). On petitioner's view, however, the VA cannot procure goods or services from the FSS—and perhaps cannot procure goods or services from any government source—unless and until a VA contracting officer has performed the market research needed to make a Rule of Two determination or to support a sole-source award. And whenever the Rule of Two is satisfied, the VA would be required under petitioner's approach to solicit and award a new contract on a sole-source basis or via competition restricted to VOSBs.

That approach would seriously disrupt the VA's operations. Although a Rule of Two determination can be relatively swift, depending on the size and circumstances of the procurement, see 48 C.F.R. 10.002, 810.002, it always requires reasonable effort. See *Information Ventures, Inc.*, B-294267, 2004 CPD ¶ 205, at 3-4 (Comp. Gen. Oct. 8, 2004). The VA reported that in fiscal year 2009, it engaged in more than 200,000 transactions, and approximately 60% of those were via the FSS. *2009 Goaling Report* 1; see 74 Fed. Reg. at 64,624. Adding new obstacles to tens of thousands of procurements annually would significantly increase the VA's burden, likely force the VA to hire many more contracting officers, and delay the VA's acquisition of important medical supplies and services.

The consequences would be particularly severe in any procurement where the VA would otherwise have used the FSS but finds that the Rule of Two is satisfied. In that situation, the VA would be forced to solicit and award a new contract on the open market, which takes more time and effort than placing an order under a pre-existing FSS contract for which the applicable procedural requirements have already been satisfied. See *FSS Contracting* 41 (FSS procurement "translates into significant savings for customer agencies in terms of resources and costs"); GSA Office of Inspector Gen., *Limited Audit of Federal Supply Service's Contracting for Services Under Multiple Award Schedule Contracts* 2-3 (Jan. 9, 2001), http://www.gsaig.gov/?LinkServID=6d21dead-0a20-9ff2-cd6d275b115ebd95 (use of the FSS avoids the "cumbersome and administratively costly traditional procurement process").

For certain supplies or services—such as medical or surgical supplies, laboratory services, medical professional staffing, or a mortuary freezer—delay could be harmful or offensive to the veterans the VA strives to serve. For mundane low-cost or repetitive procurement needs, a requirement that the VA apply the Rule of Two could cause administrative costs and delay far out of proportion to the value of the contract (and thus far out of proportion to the likely effect of a set-aside on the achievement of the Secretary's goals). Indeed, the VA has previously faced bid protests based on petitioner's interpretation of Section 8127 when the VA used the FSS to buy "two griddles and one food slicer," *Aldevra*, B-405271, 2011 CPD ¶ 183, at 1 (Comp. Gen. Oct. 11, 2011) (*Aldevra I*), and one "ice maker/dispenser," *Aldevra*, B-406205, 2012 CPD ¶ 112, at 1 (Comp. Gen. Mar. 14, 2012) (*Aldevra II*). See Pet. Br. 18-21, 35, 49-50 (discussing *Aldevra I* and *Aldevra II*).

Interpreting Section 8127 to apply to FSS procurement would also raise serious questions about other important VA procurement vehicles. For example, the VA buys $4 billion worth of pharmaceuticals annually by placing numerous orders under an indefinite-delivery contract that allows for fast web-based ordering and "just-in-time" delivery. Office of Acquisition & Logistics, *Pharmaceutical Prime Vendor*, http://www.va.gov/oal/business/nc/ppv.asp (last visited Sept. 28, 2015). It is unclear whether or how, under petitioner's interpretation of Section 8127(d), a VA hospital's placement of an order for additional penicillin under that indefinite-delivery contract could be distinguished from the FSS order at issue in this case. It is similarly unclear whether

petitioner's approach would allow a VA hospital to procure medical supplies from another VA hospital's excess, or from the excess held by another federal agency, rather than soliciting and awarding a new contract under the Rule of Two. Petitioner's argument likewise calls into question the VA's authority to modify, or to exercise an option under, a pre-existing contract without following the Rule of Two procedures that Section 8127(d) prescribes when the agency "award[s] contracts."

While the costs associated with petitioner's approach would be substantial, the benefits to VOSBs would be uncertain and limited. Many VOSBs already have FSS schedule contracts and the VA often places FSS orders with VOSBs. In 2011, 13% of the VA's FSS spending dollars went to VOSBs. Pet. App. 4a. That exceeded the VA's goal for VOSBs in 2011, which was 12%. *Id.* at 9a. The burdens associated with a Rule of Two assessment would be particularly pointless in those instances where the VA would otherwise have used the FSS to procure the same goods or services from a VOSB. Cf. note 8, *supra* (explaining that the FAR Council declined to impose mandatory small-business set-asides for FSS orders generally, based on its determination that such an approach would burden agencies without producing demonstrable benefits to small businesses) (quoting 69 Fed. Reg. at 34,232).

b. Petitioner contends (Br. 37) that its position "will not cause any fiscal waste" because Section 8127 ensures that the VA will pay a "fair and reasonable price that offers best value to the United States." 38 U.S.C. 8127(d). An important benefit of indefinite-delivery contracts, however, is that they provide

agencies the cost advantage associated with high-volume buying, even in circumstances where the dollar value of each individual task order is relatively small. See Office of Inspector Gen., *Audit of Veterans Health Administration Open Market Medical Equipment and Supply Purchases*, at i (July 21, 2009), http://www.va.gov/oig/52/reports/2009/VAOIG-08-01519-172.pdf (finding that awarding new contracts on the open market rather than placing FSS orders wasted approximately $8 million per year at the Veterans Health Administration). Petitioner's approach would deprive the VA of that advantage. And even if the price were the same, petitioner's interpretation would still cause harm and fiscal waste through disruption, overhead, and delay.

The sole-source procedures authorized by subsections (b) and (c) do not eliminate the red tape, delay, and waste described above. The absence of competition generally increases the risk that the VA will pay inflated prices or procure from a source that is not actually responsible. Cf. 41 U.S.C. 3301, 3303. To guard against those risks, agencies ordinarily must conduct time-consuming inquiries before making a sole-source award. *Inter alia*, before awarding a sole-source contract under subsection (b) or (c), a contracting officer ordinarily must perform adequate research to make a determination that the vendor is a responsible source and that "[a]ward can be made at a fair and reasonable price." 48 C.F.R. 819.7007(a)(3)-(4), 819.7008(a)(3)-(4). The VA still must ordinarily "synopsize[]" the opportunity and publicize it in advance, 48 C.F.R. 819.7007(a)(2), 819.7008(a)(2), and the contracting officer must justify in writing, certify the justification, and, depending on the amount, obtain

approval of the choice to award a sole-source contract. See 41 U.S.C. 3304(e); 48 C.F.R. 6.303-1, 6.303-2, 6.304, 806.304. And although the VA could in some circumstances award a sole-source contract swiftly with fewer protections, doing so would maximize the risks to the VA those protections guard against.[9]

6. The VA's procurement regime, including the agency's continued placement of orders under pre-existing FSS contracts, is consistent with the purposes of Section 8127

As petitioner explains (Br. 2-3, 41-43), Congress enacted Section 8127 to address the shortcomings of the discretionary government-wide contracting preference for SDVOSBs by providing the VA with unique tools and duties. Contrary to petitioner's contention, however, the VA's procurement regime is fully consistent with those statutory purposes.

Under the 2006 Veterans Act, the VA is the only agency that sets goals and applies contracting preferences for VOSBs generally, rather than solely for SDVOSBs. Compare 38 U.S.C. 8127(a)-(d), with 15 U.S.C. 644(g)(1)(A)(ii), 657f(a) and (b). The VA is the

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[9] If Section 8127(d) is read to apply to task orders under pre-existing FSS contracts, the VA would also face significant problems satisfying its requirements through FSS set-asides. Section 8127's procedures can be used to award contracts only to VOSBs that are verified in the VA's database, 38 U.S.C. 8127(e) and (f)(4). GSA awards FSS contracts based on contractor self-certification, without reference to the VA's database. See 48 C.F.R. 8.405-5(a). Accordingly, the VA could not use an FSS schedule's designation of a firm as a VOSB as the basis for an FSS set-aside compliant with Section 8127. In any event, petitioner has stated that it was not listed on the particular FSS schedule used here, see CFC Doc. 22, at 3 (Sept. 18, 2012), and thus could not have benefitted from an FSS set-aside.

only agency that is empowered to enter into sole-source contracts with SDVOSBs (and VOSBs) regardless of whether the Rule of Two is satisfied. Compare 38 U.S.C. 8127(b)-(c), with 15 U.S.C. 657f(a)(1)-(3). The VA is the only agency that must give first and second priority to contracting preferences for SDVOSBs and VOSBs. Compare 38 U.S.C. 8127(i), with 48 C.F.R. 19.203(a)-(c). And under Section 8127(d) and the VA's regulations, the VA is the only agency that must consider a preference for VOSBs whenever it solicits and awards a new contract on the open market. Compare 38 U.S.C. 8127(d) and 48 C.F.R. 819.7005(a), 819.7006(a), with 15 U.S.C. 657f(b) and 48 C.F.R. 19.1405(a)(1).

In enacting Section 8127, Congress sought to ensure that the VA's use of SDVOSB and VOSB contractors would be greater than it had been in the past, and that the VA would serve as a model for other federal agencies. Congress did not intend, however, that the interest in increasing opportunities for veteran-owned businesses should take precedence in *every* VA procurement over the achievement of competing agency objectives. Through its procurement practices, including consideration of a VOSB preference whenever the agency solicits and awards a contract on the open market, the VA "put[s] veteran businesses at the head of the line for small business set-asides." *A Proposed Amendment to H.R. 3082: Hearing Before the Subcomm. on Economic Opportunity of the House Comm. on Veterans' Affairs*, 109th Cong., 2d Sess. 1 (2006) (statement of Rep. Boozman, Chairman). But the VA needs the flexibility to purchase under pre-existing government contracts in order to put caring for veterans at the head of the line of its overall mission.

7. The pro-veteran canon of statutory construction is inapposite here

The canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor," *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991), does not alter the analysis. Petitioner has not identified (Br. 44) any government-contracting case in which a court has applied that canon. Application of the canon would be especially unwarranted here, since the decision whether to utilize the FSS in any particular procurement can require the VA to balance the competing interests of different classes of veterans.

Construing Section 8127(d) to cover the placement of orders under pre-existing FSS contracts, thereby requiring the VA to forgo use of the FSS and instead to solicit and award a new contract on the open market whenever the Rule of Two is satisfied, would help some veterans who own small businesses. See 73 Fed. Reg. 49,141 (Aug. 20, 2008). That approach would harm other veterans, however, by imposing delays and administrative costs that would impede the VA's ability to provide high-quality benefits and care. See *United States* v. *Oregon*, 366 U.S. 643, 647 (1961) ("Many veterans * * * have had to depend upon these benefits for long periods of their lives."). In any particular procurement, petitioner's approach would also favor veteran-owners whose businesses are *not* listed on the relevant FSS schedule (who can win an award only if a new contract is solicited) over those whose businesses *are* listed (who could have won under the FSS). The pro-veteran canon of construction does not help to resolve such competing considerations, as all veterans have "drop[ped] their own affairs

to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943); cf. *Burden* v. *Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013) (canon inapposite for dispute between the surviving spouses and the children of deceased veterans), cert. denied, 134 S. Ct. 2134 (2014).

The VA has also issued controlling regulations here, and this Court has never suggested that the pro-veteran canon overrides deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Cf. *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 743-744 (1996) (rejecting argument that the presumption against preemption "trumps *Chevron*"). Indeed, such a ruling could undermine every VA regulation that addresses veterans' benefits.

B. The VA's Interpretation Of Section 8127 Warrants Judicial Deference

As explained above, Section 8127(d) applies by its terms only when the VA "award[s] contracts." 38 U.S.C. 8127(d). In light of the statutory and regulatory background against which Congress enacted Section 8127(d), that language is best understood not to encompass the placement of orders under *pre-existing* FSS or other indefinite-delivery contracts. To the extent ambiguity remains after consideration of the provision's text and context, the VA has promulgated regulations that preserve its ability to place orders under pre-existing FSS contracts, without applying small-business contracting preferences. See 48 C.F.R. 808.405-2, 819.7005, 819.7006, 819.7007, 819.7008. For the reasons set forth above, the VA's interpretation of Section 8127 is reasonable and warrants deference under *Chevron*, 467 U.S. at 844.

Petitioner contends (Br. 46-52) that, notwithstanding the government's consistent position, the VA's regulations actually make Section 8127 mandatory in all procurements. That is incorrect. It is true that, under the VA's regulations, the analysis conducted by the agency *when it awards a new contract on the open market* does not depend on whether the agency is satisfying or will satisfy the annual goals established by the Secretary pursuant to 38 U.S.C. 8127(a). See 48 C.F.R. 819.7005(a), 819.7006(a). VA contracting officers thus must always consider VOSB set-asides when they award new contracts. The VA's regulations do not suggest, however, that the agency must apply the Rule of Two before placing an order under a pre-existing FSS contract.

In construing the applicable regulatory provisions, "[t]he VAAR must be utilized in conjunction with the FAR. The VAAR cannot be utilized by itself." 48 C.F.R. 801.101(b) (2007). In particular, the VA's regulations convey meaning not only by what they say, but also by where they say it. "Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title." 48 C.F.R. 1.303(a). Parts 808 and 819 thus build upon Parts 8 and 19, respectively. The VA's regulations in Part 808 do not depart from the government-wide rule in Part 8 that FSS task and delivery orders have priority over soliciting and awarding new contracts to commercial sources on the open market. See 48 C.F.R. 8.002(a), 808.002(a). And the VA's regulations in Parts 808 and 819—including its regulations here in Subpart 819.70—do not depart from the government-wide rule in Parts 8 and 19 that

agencies can place FSS orders without applying small-business contracting preferences or other procedures that govern the solicitation and award of new contracts on the open market. See 48 C.F.R. 819.7005, 819.7006, 819.7007, 819.7008; see also 48 C.F.R. 8.404(a), 19.502-1(b); pp. 10-12, *supra* (describing pertinent FAR provisions).

By plugging its regulations into these precise places in the FAR framework, without deviating from the government-wide rules established by the corresponding FAR provisions, the VA retained its ability to place FSS orders without considering small-business contracting preferences. These VA regulations, including their placement in Parts 808 and 819, were promulgated through notice-and-comment rulemaking and warrant *Chevron* deference. See 73 Fed. Reg. at 49,148-49,150; 74 Fed. Reg. at 64,630-64,636. Indeed, thousands of pages of agency-specific acquisition regulations are based on similar principles and must be understood in the context of their placement within the Code. *E.g.*, 48 C.F.R. Pt. 219 (supplementing Part 19 for the Department of Defense); 48 C.F.R. Pt. 319 (same for Department of Health and Human Services); 48 C.F.R. Pt. 419 (Department of Agriculture); 48 C.F.R. Pt. 519 (GSA).

The preamble to the VA regulations reflects the agency's contemporaneous understanding of its own rules. The preamble states that Section 8127 "does not apply to FSS task or delivery orders," and that the descending list of priority set forth in FAR Part 8 "will continue to apply to VA FSS task/delivery orders." 74 Fed. Reg. at 64,624. "Further, VA will continue to follow GSA guidance regarding applicability of [FAR P]art 19," which provides that "set-asides

do not apply to FAR [P]art 8 FSS acquisitions." *Ibid.* The preamble also explains that "FSS contracts are governed by policy developed by GSA, which has determined that set-asides do not apply to FSS orders. VA has no authority to include set-aside procedures for FSS orders under this rule." *Ibid.* That explanation reflects an accurate understanding of the text and context of the regulations, including their placement within the FAR. At most, the regulations are ambiguous as to their application to FSS orders, and the agency's contemporaneous understanding of the effect of its own regulations warrants deference under *Auer* v. *Robbins*, 519 U.S. 452 (1997), or *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944).[10]

C. Petitioner's Suggestion That The VA May Not Have Achieved The Secretary's SDVOSB And VOSB Contracting Goals For Prior Years Provides No Basis For Reversing The Judgment Below

1. Section 8127 requires the VA to establish contracting goals for SDVOSBs and VOSBs, and it con-

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[10] The government argued below that it "may continue to use the FSS without regard to the Rule of Two," that petitioner's interpretation renders the Secretary's power to set goals superfluous, and that the VA's interpretation warrants deference. Br. in Opp. 21; see *id.* at 14-15, 20-23; see also J.A. 18 ("[T]he VA maintains that FSS acquisitions are not impacted by VA's SDVOSB/VOSB authority."); Gov't C.A. Br. 12, 29-35; CFC Doc. 23, at 10, 19-21 (Oct. 9, 2012). Insofar as this brief grounds those arguments in the difference between placing an order under a pre-existing FSS contract and awarding a new contract, that rationale is consistent with the CFC's decision, see Pet. App. 38a-39a; with the VA's position in the *Aldevra* protests, see J.A. 6-7, 8-9; with the VA's contemporaneous explanation in the regulatory preamble, see 74 Fed. Reg. at 64,624; and with longstanding practice under the FAR, *e.g.*, 48 C.F.R. 38.101(e).

tains other mandatory requirements that increase the likelihood that the goals will be met. But the VA always has discretion to place FSS task and delivery orders without applying Section 8127(d)'s contracting preference. Like other socioeconomic contracting programs, success or failure in meeting goals can influence how contracting officers exercise their discretion, but it does not create or eliminate that discretion. See *J.H. Rutter Rex Mfg.*, 706 F.2d at 711; see also *Crandal* v. *Ball, Ball & Brosamer, Inc.*, 99 F.3d 907, 909 (9th Cir. 1996) (courts of appeals "unanimously agree[] that the Small Business Act does not create a private right of action in individuals" to enforce goals). Congress has established only one program that required set-asides "[i]f a participating agency has failed to attain its small business participation goal," and it imposed that requirement expressly. Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, § 713(b), 102 Stat. 3892, repealed by 2010 Jobs Act § 1335, 124 Stat. 2543. Congress did not use similar language here.

2. Even if the VA's failure to meet its goals could disable it from placing orders under FSS contracts, the judgment below should be affirmed. The procurement here occurred in fiscal year 2012, and the VA has certified that it exceeded its 2012 goals. Pet. App. 9a. Petitioner contends (Br. 24 n.2, 39-40) that it is difficult to assess the VA's success and that "the statistics are inaccurate," but petitioner does not assert that the VA actually fell short in 2012.

No record evidence would support such an allegation. Petitioner notes (Br. 24 n.2) that the VA's Inspector General found that the VA "may" have failed

to meet its goals in 2010 and before, primarily because VOSBs subcontracted too much work to non-veteran subcontractors. Office of Inspector Gen., *Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs* 3 (July 25, 2011), http://www.va.gov/oig/52/reports/2011/VAOIG-10-02436-234.pdf. In 2010, Congress addressed those problems by amending Section 8127 to impose additional subcontractor-verification requirements. Veterans Small Business Verification Act, Pub. L. No. 111-275, § 104, 124 Stat. 2867-2868. The VA has certified that it exceeded its goals for each year since then. Pet. App. 9a.

Petitioner also notes (Br. 24 n.2) that a senior VA official, acting as a putative whistleblower, alleged in 2015 that the total-spending figures certified by the agency "may" have been "understated by as much as $6B to $10B annually," primarily because the VA's reported figures excluded non-VA care. Letter from Jan R. Frye, Deputy Assistant Sec'y for Acquisition & Logistics, VA, to Robert A. McDonald, Sec'y, VA 3 (Mar. 19, 2015) (on file with the Office of the Solicitor General). The record in this case does not include any evidence supporting that allegation. But even taking as true the most extreme version of the official's allegation—*i.e.*, that the VA should have reported an additional $10 billion in spending and that no portion of that additional spending went to VOSBs—the VA still exceeded its 2012 goals. For 2012, VA reported that it had spent $17.52 billion, including $3.37 billion on SDVOSBs and $3.81 billion on VOSBs. *2012 Goaling Report* 1. Even if the VA's actual spending was $27.52 billion and the reported amounts spent on SDVOSBs and VOSBs are held constant, 12.25% of

the VA's spending went to SDVOSBs and 13.85% to VOSBs. Because the VA's goals for those groups were 10% and 12%, respectively, Pet. App. 9a, the VA officer's allegation does not cast doubt on the agency's achievement of its goals for 2012.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

1. 38 U.S.C. 8127 provides:

Small business concerns owned and controlled by veterans: contracting goals and preferences

(a) CONTRACTING GOALS.—(1) In order to increase contracting opportunities for small business concerns owned and controlled by veterans and small business concerns owned and controlled by veterans with service-connected disabilities, the Secretary shall—

(A) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans who are not veterans with service-connected disabilities in accordance with paragraph (2); and

(B) establish a goal for each fiscal year for participation in Department contracts (including subcontracts) by small business concerns owned and controlled by veterans with service-connected disabilities in accordance with paragraph (3).

(2) The goal for a fiscal year for participation under paragraph (1)(A) shall be determined by the Secretary.

(3) The goal for a fiscal year for participation under paragraph (1)(B) shall be not less than the Government-wide goal for that fiscal year for participation by small business concerns owned and controlled by veterans with service-connected disabilities under section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)).

(4) The Secretary shall establish a review mechanism to ensure that, in the case of a subcontract of a Department contract that is counted for purposes of meeting a goal established pursuant to this section, the subcontract was actually awarded to a business concern that may be counted for purposes of meeting that goal.

(b) USE OF NONCOMPETITIVE PROCEDURES FOR CERTAIN SMALL CONTRACTS.—For purposes of meeting the goals under subsection (a), and in accordance with this section, in entering into a contract with a small business concern owned and controlled by veterans for an amount less than the simplified acquisition threshold (as defined in section 134 of title 41), a contracting officer of the Department may use procedures other than competitive procedures.

(c) SOLE SOURCE CONTRACTS FOR CONTRACTS ABOVE SIMPLIFIED ACQUISITION THRESHOLD.—For purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department may award a contract to a small business concern owned and controlled by veterans using procedures other than competitive procedures if—

(1) such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) the anticipated award price of the contract (including options) will exceed the simplified acquisition threshold (as defined in section 134 of title 41) but will not exceed $5,000,000; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price that offers best value to the United States.

(d) USE OF RESTRICTED COMPETITION.—Except provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States.

(e) ELIGIBILITY OF SMALL BUSINESS CONCERNS.—A small business concern may be awarded a contract under this section only if the small business concern and the veteran owner of the small business concern are listed in the database of veteran-owned businesses maintained by the Secretary under subsection (f).

(f) DATABASE OF VETERAN-OWNED BUSINESSES. —(1) Subject to paragraphs (2) through (6), the Secretary shall maintain a database of small business concerns owned and controlled by veterans and the veteran owners of such business concerns.

(2)(A) To be eligible for inclusion in the database, such a veteran shall submit to the Secretary

such information as the Secretary may require with respect to the small business concern or the veteran. Application for inclusion in the database shall constitute permission under section 552a of title 5 (commonly referred to as the Privacy Act) for the Secretary to access such personal information maintained by the Secretary as may be necessary to verify the information contained in the application.

(B) If the Secretary receives an application for inclusion in the database from an individual whose status as a veteran cannot be verified because the Secretary does not maintain information with respect to the veteran status of the individual, the Secretary may not include the small business concern owned and controlled by the individual in the database maintained by the Secretary until the Secretary receives such information as may be necessary to verify that the individual is a veteran.

(3) Information maintained in the database shall be submitted on a voluntary basis by such veterans.

(4) No small business concern may be listed in the database until the Secretary has verified that—

(A) the small business concern is owned and controlled by veterans; and

(B) in the case of a small business concern for which the person who owns and controls the concern indicates that the person is a veteran with a service-connected disability, that the person is a veteran with a service-connected disability.

(5) The Secretary shall make the database available to all Federal departments and agencies and shall notify each such department and agency of the availability of the database.

(6) If the Secretary determines that the public dissemination of certain types of information maintained in the database is inappropriate, the Secretary shall take such steps as are necessary to maintain such types of information in a secure and confidential manner.

(g) ENFORCEMENT PENALTIES FOR MISREPRESENTATION.—(1) Any business concern that is determined by the Secretary to have willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by veterans or as a small business concern owned and controlled by service-disabled veterans for purposes of this subsection shall be debarred from contracting with the Department for a period of not less than five years.

(2) In the case of a debarment under paragraph (1), the Secretary shall commence debarment action against the business concern by not later than 30 days after determining that the concern willfully and intentionally misrepresented the status of the concern as described in paragraph (1) and shall complete debarment actions against such concern by not later than 90 days after such determination.

(3) The debarment of a business concern under paragraph (1) includes the debarment of all principals

in the business concern for a period of not less than five years.

(h) TREATMENT OF BUSINESSES AFTER DEATH OF VETERAN-OWNER.—(1) Subject to paragraph (3), if the death of a veteran causes a small business concern to be less than 51 percent owned by one or more veterans, the surviving spouse of such veteran who acquires ownership rights in such small business concern shall, for the period described in paragraph (2), be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a small business concern owned and controlled by veterans.

(2) The period referred to in paragraph (1) is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(A) The date on which the surviving spouse remarries.

(B) The date on which the surviving spouse relinquishes an ownership interest in the small business concern.

(C) The date that is ten years after the date of the veteran's death.

(3) Paragraph (1) only applies to a surviving spouse of a veteran with a service- connected disability rated as 100 percent disabling or who dies as a result of a service-connected disability.

(i) PRIORITY FOR CONTRACTING PREFERENCES.—Preferences for awarding contracts to small business

concerns shall be applied in the following order of priority:

(1) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans with service-connected disabilities.

(2) Contracts awarded pursuant to subsection (b), (c), or (d) to small business concerns owned and controlled by veterans that are not covered by paragraph (1).

(3) Contracts awarded pursuant to—

(A) section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(B) section 31 of such Act (15 U.S.C. 657a).

(4) Contracts awarded pursuant to any other small business contracting preference.

(j) APPLICABILITY OF REQUIREMENTS TO CONTRACTS.—(1) If after December 31, 2008, the Secretary enters into a contract, memorandum of understanding, agreement, or other arrangement with any governmental entity to acquire goods or services, the Secretary shall include in such contract, memorandum, agreement, or other arrangement a requirement that the entity will comply, to the maximum extent feasible, with the provisions of this section in acquiring such goods or services.

(2) Nothing in this subsection shall be construed to supersede or otherwise affect the authorities provided under the Small Business Act (15 U.S.C. 631 et seq.).

(k) ANNUAL REPORTS.—Not later than December 31 each year, the Secretary shall submit to Congress a report on small business contracting during the fiscal year ending in such year. Each report shall include, for the fiscal year covered by such report, the following:

(1) The percentage of the total amount of all contracts awarded by the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(2) The percentage of the total amount of all such contracts awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(3) The percentage of the total amount of all contracts awarded by each Administration of the Department during that fiscal year that were awarded to small business concerns owned and controlled by veterans.

(4) The percentage of the total amount of all contracts awarded by each such Administration during that fiscal year that were awarded to small business concerns owned and controlled by veterans with service-connected disabilities.

(*l*) DEFINITIONS.—In this section:

(1) The term "small business concern" has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(2) The term "small business concern owned and controlled by veterans" means a small business concern—

(A)(i) not less than 51 percent of which is owned by one or more veterans or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(ii) the management and daily business operations of which are controlled by one or more veterans; or

(B) not less than 51 percent of which is owned by one or more veterans with service-connected disabilities that are permanent and total who are unable to manage the daily business operations of such concern or, in the case of a publicly owned business, not less than 51 percent of the stock of which is owned by one or more such veterans.

2. 38 U.S.C. 8128 provides:

Small business concerns owned and controlled by veterans: contracting priority

(a) CONTRACTING PRIORITY.—In procuring goods and services pursuant to a contracting preference under this title or any other provision of law, the Secretary shall give priority to a small business concern owned and controlled by veterans, if such business

concern also meets the requirements of that contracting preference.

(b) DEFINITION.—For purposes of this section, the term "small business concern owned and controlled by veterans" means a small business concern that is included in the small business database maintained by the Secretary under section 8127(f) of this title.

3. 15 U.S.C. 637 provides in pertinent part:

Additional powers

(a) Procurement contracts; subcontracts to disadvantaged small business concerns; performance bonds; contract negotiations; definitions; eligibility; determinations; publication; recruitment; construction subcontracts; annual estimates; Indian tribes

(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate—

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. * * * A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price;

(B) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts;

* * * * *

(D)(i) A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if—

(I) there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price, and

(II) the anticipated award price of the contract (including options) will exceed $5,000,000 in the case of a contract opportunity assigned a standard industrial classification code for manufacturing and $3,000,000 (including options) in the case of all other contract opportunities.

* * * * *

(4)(A) For purposes of this section, the term "socially and economically disadvantaged small business

concern" means any small business concern which meets the requirements of subparagraph (B) and—

(i) which is at least 51 per centum unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization, or

(ii) in the case of any publicly owned business, at least 51 per centum of the stock of which is unconditionally owned by—

(I) one or more socially and economically disadvantaged individuals,

(II) an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe), or

(III) an economically disadvantaged Native Hawaiian organization.

(B) A small business concern meets the requirements of this subparagraph if the management and daily business operations of such small business concern are controlled by one or more—

(i) socially and economically disadvantaged individuals described in subparagraph (A)(i)(I) or subparagraph (A)(ii)(I),

(ii) members of an economically disadvantaged Indian tribe described in subparagraph (A)(i)(II) or subparagraph (A)(ii)(II), or

(iii) Native Hawaiian organizations described in subparagraph (A)(i)(III) or subparagraph (A)(ii)(III).

(C) Each Program Participant shall certify, on an annual basis, that it meets the requirements of this paragraph regarding ownership and control.

* * * * *

(m) Procurement program for women-owned small business concerns

* * * * *

(2) Authority to restrict competition

In accordance with this subsection, a contracting officer may restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women, if—

(A) each of the concerns is not less than 51 percent owned by one or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

(B) the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by women will submit offers for the contract;

(C) the contract is for the procurement of goods or services with respect to an industry identified by the Administrator pursuant to paragraph (3);

(D) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price; and

(E) each of the concerns—

(i) is certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, as a small business concern owned and controlled by women; or

(ii) certifies to the contracting officer that it is a small business concern owned and controlled by women and provides adequate documentation, in accordance with standards established by the Administration, to support such certification.

* * * * *

4. 15 U.S.C. 644 provides in pertinent part:

Awards or contracts

(a) Determination

To effectuate the purposes of this chapter, small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Govern-

ment property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; but nothing contained in this chapter shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Government or any agency thereof. * * * A contract may not be awarded under this subsection if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price.

* * * * *

(g) Goals for participation of small business concerns in procurement contracts

(1) GOVERNMENTWIDE GOALS.—

(A) ESTABLISHMENT.—The President shall annually establish Governmentwide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disad-

vantaged individuals, and small business concerns owned and controlled by women in accordance with the following:

(i) The Governmentwide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year.

(ii) The Governmentwide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iii) The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iv) The Governmentwide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(v) The Governmentwide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime

contract and subcontract awards for each fiscal year.

(B) ACHIEVEMENT OF GOVERNMENTWIDE GOALS.—Each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Small Business Administration and the Administrator for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Governmentwide prime contract goal established by the President pursuant to this paragraph.

(2)(A) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency. Such goals shall separately

address prime contract awards and subcontract awards for each category of small business covered.

* * * * *

(j) Small business reservation

(1) Each contract for the purchase of goods and services that has an anticipated value greater than $2,500 but not greater than $100,000 shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror.

(3) Nothing in paragraph (1) shall be construed as precluding an award of a contract with a value not greater than $100,000 under the authority of subsection (a) of section 637 of this title, section 2323 of title 10, section 712[1] of the Business Opportunity Development Reform Act of 1988 (Public Law 100-656; 15 U.S.C. 644 note), or section 7102 of the Federal Acquisition Streamlining Act of 1994.

* * * * *

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[1] See References in Text note below.

(r) Multiple award contracts

Not later than 1 year after September 27, 2010, the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, establish guidance under which Federal agencies may, at their discretion—

(1) Set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);

(2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10 and section 4106(c) of title 41, set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2); and

(3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in subsection (g)(2).

5. 15 U.S.C. 657a (2006) provides in pertinent part:

HUBZone program

(a) In general

There is established within the Administration a program to be carried out by the Administrator to

provide for Federal contracting assistance to qualified HUBZone small business concerns in accordance with this section.

(b) Eligible contracts

* * * * *

(2) Authority of contracting officer

Notwithstanding any other provision of law—

(A) a contracting officer may award sole source contracts under this section to any qualified HUBZone small business concern, if—

(i) the qualified HUBZone small business concern is determined to be a responsible contractor with respect to performance of such contract opportunity, and the contracting officer does not have a reasonable expectation that 2 or more qualified HUBZone small business concerns will submit offers for the contracting opportunity;

(ii) the anticipated award price of the contract (including options) will not exceed—

(I) $5,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(II) $3,000,000, in the case of all other contract opportunities; and

(iii) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price;

(B) a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price; and

(C) not later than 5 days from the date the Administration is notified of a procurement officer's decision not to award a contract opportunity under this section to a qualified HUBZone small business concern, the Administrator may notify the contracting officer of the intent to appeal the contracting officer's decision, and within 15 days of such date the Administrator may file a written request for reconsideration of the contracting officer's decision with the Secretary of the department or agency head.

* * * * *

6. 15 U.S.C. 657f provides in pertinent part:

Procurement program for small business concerns owned and controlled by service-disabled veterans

(a) Sole source contracts

In accordance with this section, a contracting officer may award a sole source contract to any small business concern owned and controlled by service-disabled veterans if—

(1) such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more small business concerns owned and controlled by service-disabled veterans will submit offers for the contracting opportunity;

(2) the anticipated award price of the contract (including options) will not exceed—

(A) $5,000,000, in the case of a contract opportunity assigned a standard industrial classification code for manufacturing; or

(B) $3,000,000, in the case of any other contract opportunity; and

(3) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

(b) Restricted competition

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to small business concerns owned and controlled by service-disabled veterans if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price.

(c) Relationship to other contracting preferences

A procurement may not be made from a source on the basis of a preference provided under subsection (a)

or (b) of this section if the procurement would otherwise be made from a different source under section 4124 or 4125 of title 18 or chapter 85 of title 41.

* * * * *

7. 40 U.S.C. 501 provides in pertinent part:

Services for executive agencies

(a) AUTHORITY OF ADMINISTRATOR OF GENERAL SERVICES.—

(1) IN GENERAL.—The Administrator of General Services shall take action under this subchapter for an executive agency—

(A) to the extent that the Administrator of General Services determines that the action is advantageous to the Federal Government in terms of economy, efficiency, or service; and

(B) with due regard to the program activities of the agency.

* * * * *

(b) PROCUREMENT AND SUPPLY.—

(1) FUNCTIONS.—

(A) IN GENERAL.—The Administrator of General Services shall procure and supply personal property and nonpersonal services for executive agencies to use in the proper discharge of their responsibilities, and perform functions re-

lated to procurement and supply including contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting.

* * * * *

(2) POLICIES AND METHODS.—

(A) IN GENERAL.—The Administrator of General Services shall prescribe policies and methods for executive agencies regarding the procurement and supply of personal property and nonpersonal services and related functions.

(B) CONTROLLING REGULATION.—Policies and methods prescribed by the Administrator of General Services under this paragraph are subject to regulations prescribed by the Administrator for Federal Procurement Policy under division B (except sections 1704 and 2303) of subtitle I of title 41.

* * * * *

8. 41 U.S.C. 152 provides in pertinent part:

Competitive procedures

In division C, the term "competitive procedures" means procedures under which an executive agency enters into a contract pursuant to full and open competition. The term also includes—

* * * * *

(3) the procedures established by the Administrator of General Services for the multiple awards schedule program of the General Services Administration if—

(A) participation in the program has been open to all responsible sources; and

(B) orders and contracts under those procedures result in the lowest overall cost alternative to meet the needs of the Federal Government;

(4) procurements conducted in furtherance of section 15 of the Small Business Act (15 U.S.C. 644) as long as all responsible business concerns that are entitled to submit offers for those procurements are permitted to compete.

* * * * *

9. 41 U.S.C. 1121 provides in pertinent part:

General authority

* * * * *

(b) FEDERAL ACQUISITION REGULATION.—To the extent that the Administrator considers appropriate in carrying out the policies and functions set forth in this division, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies. The policies shall be implemented in a single Government-wide procurement regulation called the Federal Acquisition Regulation.

(c) POLICIES TO BE FOLLOWED BY EXECUTIVE AGENCIES.—

(1) AREAS OF PROCUREMENT FOR WHICH POLICIES ARE TO BE FOLLOWED.—The policies implemented in the Federal Acquisition Regulation shall be followed by executive agencies in the procurement of—

(A) property other than real property in being;

(B) services, including research and development; and

(C) construction, alteration, repair, or maintenance of real property.

(2) PROCEDURES TO ENSURE COMPLIANCE.—The Administrator shall establish procedures to

ensure compliance with the Federal Acquisition Regulation by all executive agencies.

(3) APPLICATION OF OTHER LAWS.—The authority of an executive agency under another law to prescribe policies, regulations, procedures, and forms for procurement is subject to the authority conferred in this section and sections 1122(a) to (c)(1), 1125, 1126, 1130, 1131, and 2305 of this title.

* * * * *

10. 41 U.S.C. 3301 provides:

Full and open competition

(a) IN GENERAL.—Except as provided in sections 3303, 3304(a), and 3305 of this title and except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall—

(1) obtain full and open competition through the use of competitive procedures in accordance with the requirements of this division and the Federal Acquisition Regulation; and

(2) use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

(b) APPROPRIATE COMPETITIVE PROCEDURES.—

(1) USE OF SEALED BIDS.—In determining the competitive procedures appropriate under the circumstance, an executive agency shall—

(A) solicit sealed bids if—

(i) time permits the solicitation, submission, and evaluation of sealed bids;

(ii) the award will be made on the basis of price and other price-related factors;

(iii) it is not necessary to conduct discussions with the responding sources about their bids; and

(iv) there is a reasonable expectation of receiving more than one sealed bid; or

(B) request competitive proposals if sealed bids are not appropriate under subparagraph (A).

(2) SEALED BID NOT REQUIRED.—Paragraph (1)(A) does not require the use of sealed-bid procedures in cases in which section 204(e)[1] of title 23 applies.

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[1] See References in Text note below. Section 204 of title 23, referred to in subsec. (b)(2), was repealed and a new section 204 enacted by Pub. L. 112-141, div. A, title I, § 1119(a), July 6, 2012, 126 Stat. 473, 489.

(c) EFFICIENT FULFILLMENT OF GOVERNMENT REQUIREMENTS.—The Federal Acquisition Regulation shall ensure that the requirement to obtain full and open competition is implemented in a manner that is consistent with the need to efficiently fulfill the Federal Government's requirements.

APPENDIX B

2011 Edition

Title 48—Federal Acquisition Regulations System

CHAPTER 1 — FEDERAL ACQUISITION REGULATION

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1. 48 C.F.R. 1.303 (2011) provides:

Publication and codification.

(a) Agency-wide acquisition regulations shall be published in the FEDERAL REGISTER as required by law, shall be codified under an assigned chapter in Title 48, Code of Federal Regulations, and shall parallel the FAR in format, arrangement, and numbering system (but see 1.104-1(c)). Coverage in an agency acquisition regulation that implements a specific part, subpart, section, or subsection of the FAR shall be numbered and titled to correspond to the appropriate FAR number and title. Supplementary material for which there is no counterpart in the FAR shall be codified using chapter, part, subpart, section, or subsection numbers of 70 and up (e.g., for the Department of Interior, whose assigned chapter number in Title 48 is 14, part 1470, subpart 1401.70, section 1401.370, or subsection 1401.301-70.)

* * * * *

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. 48 C.F.R. 8.000 (2011) provides:

Scope of part.

This part deals with the acquisition of supplies and services from or through Government supply sources.

3. 48 C.F.R. 8.002 (2011) provides:

Priorities for use of Government supply sources.

(a) Except as required by 8.003, or as otherwise provided by law, agencies shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority—

(1) *Supplies.* (i) Agency inventories;

(ii) Excess from other agencies (see subpart 8.1);

(iii) Federal Prison Industries, Inc. (see subpart 8.6);

(iv) Supplies which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101-26.3), the Defense Logistics Agency

(see 41 CFR 101-26.6), the Department of Veterans Affairs (see 41 CFR 101-26.704), and military inventory control points;

(vi) Mandatory Federal Supply Schedules (see subpart 8.4);

(vii) Optional use Federal Supply Schedules (see subpart 8.4); and

(viii) Commercial sources (including educational and nonprofit institutions).

(2) *Services.* (i) Services which are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled (see Subpart 8.7);

(ii) Mandatory Federal Supply Schedules (see subpart 8.4);

(iii) Optional use Federal Supply Schedules (see subpart 8.4); and

(iv) Federal Prison Industries, Inc. (see subpart 8.6), or commercial sources (including educational and nonprofit institutions).

(b) Sources other than those listed in paragraph (a) may be used as prescribed in 41 CFR 101-26.301 and in an unusual and compelling urgency as prescribed in 6.302-2 and in 41 CFR 101- 25.101-5.

(c) The statutory obligation for Government agencies to satisfy their requirements for supplies available from the Committee for Purchase From People Who Are Blind or Severely Disabled also applies

when contractors purchase the supply items for Government use.

4. 48 C.F.R. 8.003 (2011) provides:

Use of other Government supply sources.

Agencies shall satisfy requirements for the following supplies or services from or through specified sources, as applicable:

(a) Public utility services (see part 41);

(b) Printing and related supplies (see subpart 8.8);

(c) Leased motor vehicles (see subpart 8.11);

(d) Strategic and critical materials (e.g., metals and ores) from inventories exceeding National Defense Stockpile requirements (detailed information is available from the Defense National Stockpile Center, 8725 John J. Kingman Rd., Suite 3229, Fort Belvior, VA 22060-6223; and

(e) Helium (see subpart 8.5—Acquisition of Helium).

Subpart 8.4—Federal Supply Schedules

5. 48 C.F.R. 8.402 (2011) provides in pertinent part:

General.

(a) The Federal Supply Schedule program is also known as the GSA Schedules Program or the Multiple Award Schedule Program. The Federal Supply Schedule program is directed and managed by GSA and provides Federal agencies (see 8.002) with a simplified process for obtaining commercial supplies and services at prices associated with volume buying. Indefinite delivery contracts are awarded to provide supplies and services at stated prices for given periods of time. GSA may delegate certain responsibilities to other agencies (*e.g.*, GSA has delegated authority to the VA to procure medical supplies under the VA Federal Supply Schedules program). Orders issued under the VA Federal Supply Schedule program are covered by this subpart. Additionally, the Department of Defense (DoD) manages similar systems of schedule-type contracting for military items; however, DoD systems are not covered by this subpart.

* * * * *

6. 48 C.F.R. 8.404 (2011) provides in pertinent part:

Use of Federal Supply Schedules.

(a) *General.* Parts 13 (except 13.303-2(c)(3)), 14, 15, and 19 (except for the requirement at 19.202-1(e)(1)(iii)) do not apply to BPAs or orders placed against Federal Supply Schedules contracts (but see 8.405-5). BPAs and orders placed against a MAS, using the procedures in this subpart, are considered to be issued using full and open competition (see 6.102(d)(3)). Therefore, when establishing a BPA (as authorized by 13.303-2(c)(3)), or placing orders under Federal Supply Schedule contracts using the procedures of 8.405, ordering activities shall not seek competition outside of the Federal Supply Schedules or synopsize the requirement; but *see* paragraph (g) of this section.

(b)(1) The contracting officer, when placing an order or establishing a BPA, is responsible for applying the regulatory and statutory requirements applicable to the agency for which the order is placed or the BPA is established. The requiring agency shall provide the information on the applicable regulatory and statutory requirements to the contracting officer responsible for placing the order.

(2) For orders over $500,000, *see* subpart 17.5 for additional requirements for interagency acquisitions. For example, the requiring agency shall make a determination that use of the Federal Supply Schedule is the best procurement approach, in accordance with 17.502-1(a).

(c) *Acquisition planning.* Orders placed under a Federal Supply Schedule contract—

(1) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see Part 39);

(2) Must comply with all FAR requirements for a bundled contract when the order meets the definition of "bundled contract" (see 2.101(b)); and

(3) Must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.

(d) *Pricing.* Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (*e.g.*, installation, maintenance, and repair). GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Therefore, ordering activities are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 8.405-2(d). By placing an order against a schedule contract using the procedures in 8.405, the ordering activity has concluded that the order represents the best value (as defined in FAR 2.101) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's

needs. Although GSA has already negotiated fair and reasonable pricing, ordering activities may seek additional discounts before placing an order (see 8.405-4).

* * * * *

7. 48 C.F.R. 8.405 (2011) provides:

Ordering procedures for Federal Supply Schedules.

Ordering activities shall use the ordering procedures of this section when placing an order or establishing a BPA for supplies or services. The procedures in this section apply to all schedules. For establishing BPAs and for orders under BPAs *see* 8.405-3.

8. 48 C.F.R. 8.405-5 (2011) provides:

Small business.

(a) Although the mandatory preference programs of Part 19 do not apply, orders placed against schedule contracts may be credited toward the ordering activity's small business goals. For purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

(b) Ordering activities may consider socio-economic status when identifying contractor(s) for consideration or competition for award of an order or BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor(s). GSA Advantage! and Schedules e-Library at *http://www.gsa.gov/fss* contain information on the small business representations of Schedule contractors.

(c) For orders exceeding the micro-purchase threshold, ordering activities should give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

PART 19—SMALL BUSINESS PROGRAMS

Subpart 19.2—Policies

9. 48 C.F.R. 19.201 (2011) provides in pertinent part:

General policy.

(a) It is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. Such

concerns must also have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. The Small Business Administration (SBA) counsels and assists small business concerns and assists contracting personnel to ensure that a fair proportion of contracts for supplies and services is placed with small business.

* * * * *

10. 48 C.F.R. 19.203 (2011) provides:

Relationship among small business programs.

(a) There is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15).

(b) *At or below the simplified acquisition threshold.* The requirement to exclusively reserve acquisitions for small business concerns at 19.502-2(a) does not preclude the contracting officer from awarding a contract to a small business under the 8(a) Program, HUBZone Program, SDVOSB Program, or WOSB Program. If the contracting officer does not proceed with a small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase.

(c) *Above the simplified acquisition threshold.* The contracting officer shall first consider an acquisition for the 8(a), HUBZone, SDVOSB, or WOSB programs before using a small business set-aside (*see* 19.502-2(b)). However, if a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless SBA agrees to its release in accordance with 13 CFR parts 124, 125 and 126.

(d) Small business set-asides have priority over acquisitions using full and open competition. *See* requirements for establishing a small business set-aside at subpart 19.5.

Subpart 19.5—Set-Asides for Small Business

11. 48 C.F.R. 19.501 (2011) provides in pertinent part:

General.

(a) The purpose of small business set-asides is to award certain acquisitions exclusively to small business concerns. A "set-aside for small business" is the reserving of an acquisition exclusively for participation by small business concerns. A small business set-aside may be open to all small businesses. A small business set-aside of a single acquisition or a class of acquisitions may be total or partial.

(b) The determination to make a small business set-aside may be unilateral or joint. A unilateral determination is one that is made by the contracting

officer. A joint determination is one that is recommended by the Small Business Administration (SBA) procurement center representative (or, if a procurement center representative is not assigned, see 19.402(a)) and concurred in by the contracting officer.

(c) The contracting officer shall review acquisitions to determine if they can be set aside for small business, giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs. The contracting officer shall perform market research and document why a small business set-aside is inappropriate when an acquisition is not set aside for small business, unless an award is anticipated to a small business under the 8(a), HUBZone, service-disabled veteran-owned, or WOSB programs. If the acquisition is set aside for small business based on this review, it is a unilateral set-aside by the contracting officer. Agencies may establish threshold levels for this review depending upon their needs.

* * * * *

12. 48 C.F.R. 19.502-1 (2011) provides:

Requirements for setting aside acquisitions.

(a) The contracting officer shall set aside an individual acquisition or class of acquisitions for competition among small businesses when—

(1) It is determined to be in the interest of maintaining or mobilizing the Nations full productive capacity, war or national defense programs; or

(2) Assuring that a fair proportion of Government contracts in each industry category is placed with small business concerns; and the circumstances described in 19.502-2 or 19.502-3(a) exist.

(b) This requirement does not apply to purchases of $3,000 or less ($15,000 or less for acquisitions as described in 13.201(g)(1)), or purchases from required sources of supply under Part 8 (*e.g.*, Committee for Purchase From People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts).

13. 48 C.F.R. 19.502-2 (2011) provides:

Total small business set-asides.

(a) Before setting aside an acquisition under this paragraph, refer to 19.203(b). If the contracting officer does not proceed with the small business set-aside and purchases on an unrestricted basis, the contracting officer shall include in the contract file the reason for this unrestricted purchase. If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the

requirement, if still valid, shall be resolicited on an unrestricted basis. The small business reservation does not preclude the award of a contract as described in 19.203.

(b) Before setting aside an acquisition under this paragraph, refer to 19.203(c). The contracting officer shall set aside any acquisition over $150,000 for small business participation when there is a reasonable expectation that:

(1) Offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns (see paragraph (c) of this section); and

(2) Award will be made at fair market prices. Total small business set-asides shall not be made unless such a reasonable expectation exists (see 19.502-3 as to partial set-asides). Although past acquisition history of an item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists. In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small businesses the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

(c) For small business set-asides other than for construction or services, any concern proposing to furnish a product that it did not itself manufacture must furnish the product of a small business manufac-

turer unless the SBA has granted either a waiver or exception to the nonmanufacturer rule (see 19.102(f)). In industries where the SBA finds that there are no small business manufacturers, it may issue a waiver to the nonmanufacturer rule (see 19.102(f) (4) and (5)). In addition, SBA has excepted procurements processed under simplified acquisition procedures (see part 13), where the anticipated cost of the procurement will not exceed $25,000, from the nonmanufacturer rule. Waivers permit small businesses to provide any firm's product. The exception permits small businesses to provide any domestic firm's product. In both of these cases, the contracting officer's determination in paragraph (b)(1) of this subsection or the decision not to set aside a procurement reserved for small business under paragraph (a) of this subsection will be based on the expectation of receiving offers from at least two responsible small businesses, including nonmanufacturers, offering the products of different concerns.

14. 48 C.F.R. 19.502-4 (2011) provides:

Methods of conducting set-asides.

(a) Total small business set-asides may be conducted by using simplified acquisition procedures (see part 13), sealed bids (see part 14), or competitive proposals (see part 15). Partial small business set-asides may be conducted using sealed bids (see part 14), or competitive proposals (see part 15).

(b) Except for offers on the non-setaside portion of partial set-asides, offers received from concerns that do not qualify as small business concerns shall be considered nonresponsive and shall be rejected. However, before rejecting an offer otherwise eligible for award because of questions concerning the size representation, an SBA determination must be obtained (see subpart 19.3).

PART 38—FEDERAL SUPPLY SCHEDULE CONTRACTING

Subpart 38.1—Federal Supply Schedule Program

15. 48 C.F.R. 38.101 (2011) provides:

General.

(a) The Federal Supply Schedule program, pursuant to 41 U.S.C. 259(b)(3)(A), provides Federal agencies with a simplified process of acquiring commercial supplies and services in varying quantities while obtaining volume discounts. Indefinite-delivery contracts are awarded using competitive procedures to firms. The firms provide supplies and services at stated prices for given periods of time, for delivery within a stated geographic area such as the 48 contiguous states, the District of Columbia, Alaska, Hawaii, and overseas. The schedule contracting office issues Federal Supply Schedule publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics.

(b) Each schedule identifies agencies that are required to use the contracts as primary sources of supply.

(c) Federal agencies not identified in the schedules as mandatory users may issue orders under the schedules. Contractors are encouraged to accept the orders.

(d) Although GSA awards most Federal Supply Schedule contracts, it may authorize other agencies to award schedule contracts and publish schedules. For example, the Department of Veterans Affairs awards schedule contracts for certain medical and nonperishable subsistence items.

(e) When establishing Federal Supply Schedules, GSA, or an agency delegated that authority, is responsible for complying with all applicable statutory and regulatory requirements (*e.g.*, Parts 5, 6, and 19). The requirements of parts 5, 6, and 19 apply at the acquisition planning stage prior to issuing the schedule solicitation and, generally, do not apply to orders and BPAs placed under resulting schedule contracts (except *see* 8.404).

CHAPTER 8—DEPARTMENT OF VETERANS AFFAIRS

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM

16. 48 C.F.R. 801.000 (2011) provides:

Scope of part.

This part sets out general Department of Veterans Affairs (VA) Acquisition Regulation (VAAR) policies, including information regarding the maintenance and administration of the VAAR, acquisition policies and practices, and procedures for deviation from the VAAR and the Federal Acquisition Regulation (FAR).

Subpart 801.1—Purpose, Authority, Issuance

17. 48 C.F.R. 801.101 (2011) provides:

Purpose.

(a) VA established the VAAR to codify and publish uniform policies and procedures for VA's acquisition of supplies and services, including construction.

(b) The VAAR implements and supplements the FAR.

PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

18. 48 C.F.R. 808.002 (2011) provides:

Priorities for use of Government supply sources.

(a) *Supplies.* (1) As used in FAR 8.002(a)(1)(i), the term "agency inventories" includes Supply Fund Stock and VA Excess.

(2) A national committed use contract awarded by the VA National Acquisition Center has a priority between wholesale supply sources (FAR 8.002(a)(1)(v)) and mandatory Federal Supply Schedules (FAR 8.002(a)(1)(vi)).

(3) Federal Supply Schedule contracts awarded by the VA National Acquisition Center in Federal Supply Classification (FSC) Groups 65 and 66 shall be mandatory for use by VA and shall have the same order of priority as mandatory Federal Supply Schedules (FAR 8.002(a)(1)(vi)). VA contracting officers must place orders against Federal Supply Schedules contracts awarded by the VA National Acquisition Center in FSC Groups 65 and 66 in the following descending order of priority:

(i) Nationally awarded Blanket Purchase Agreements (BPAs), issued by the VA National Acquisition Center against Federal Supply Schedules.

(ii) Multi-VISN, single-VISN, or locally awarded BPAs, issued by VISN, regional, or local VA contracting officers against Federal Supply Schedules.

(iii) Federal Supply Schedules without BPAs.

(4) Indefinite delivery indefinite quantity (IDIQ) contracts, awarded by VISN, regional, or local facility VA contracting officers, for supplies not covered by national committed use contracts or Federal Supply Schedule contracts shall have an order of priority between optional use Federal Supply Schedules (FAR 8.002(1)(a)(vii)) and commercial sources (including educational and nonprofit institutions) (FAR 8.002(1)(a)(viii)). VA contracting officers must place delivery orders against IDIQ contracts, awarded by VISN, regional, or a local facility contracting officers, for supplies not covered by national committed use contracts or Federal Supply Schedule contracts in the following descending order of priority:

(i) VISN or regionally awarded contracts.

(ii) Locally awarded contracts.

(5) Open market purchases (purchases not falling within any of the higher priorities in paragraphs (a)(2) through (4) of this section) have the same priority as commercial sources (including educational and nonprofit institutions) (FAR 8.002(1)(a)(viii)).

(b) *Unusual or compelling urgency.* The contracting officer may use a source lower in priority than as specified in paragraph (a) of this section when the need for supplies or services is of an unusual or compelling urgency (see FAR 6.302-2). The Contracting Officer must include a justification for each deviation in the procurement file.

(c) *Eligible Beneficiaries.* (1) A contracting officer may authorize an acquisition from the Veterans Canteen Service or a commercial source when a VA healthcare official (e.g., social worker, physician) determines that personal selection of shoes, clothing, and incidentals will result in a therapeutic benefit to an eligible beneficiary.

(2) The contracting officer must cite Federal Prison Industries, Inc., clearance No. 1206 in the purchase document for any purchase from a commercial source of dress shoes similar to Federal Prison Industries, Inc., Style No. 86-A.

Subpart 808.4—Federal Supply Schedules

19. 48 C.F.R. 808.402 (2011) provides:

General.

The Executive Director and Chief Operating Officer, VA National Acquisition Center, advertises, negotiates, awards, administers, and issues the Federal Supply Schedules for Federal Supply Classification Groups 62, 65, and 89 and for cost-per-test services under Group 66.

20. 48 C.F.R. 808.405-2 (2011) provides:

Ordering procedure for services requiring a statement of work.

When placing an order or establishing a BPA for supplies or services requiring a statement of work, the ordering activity, when developing the statement of work and any evaluation criteria in addition to price, shall adhere to and apply the evaluation factor commitments at 815.304-70.

PART 819—SMALL BUSINESS PROGRAMS

Subpart 819.5—Set-Asides for Small Business

21. 48 C.F.R. 819.502 (2011) provides:

Setting aside acquisitions.

22. 48 C.F.R. 819.502-2 (2011) provides:

Total small business set-asides.

(a) When a total small business set-aside is made, one of the following statements, as applicable, will be included in the solicitation for bids:

(1) Notice of total small business set-aside, page __, applies to all items in this solicitation.

(2) Notice of total small business set-aside, page __, applies to items __ through __ in this solicitation.

(b) Contracting officers must ensure that the appropriate product or service classification and the related size standard are included in each solicitation.

Subpart 819.70—Service-Disabled Veteran-Owned and Veteran-Owned Small Business Acquisition Program

23. 48 C.F.R. 819.7001 (2011) provides:

General.

(a) Sections 502 and 503 of the Veterans Benefits, Health Care, and Information Technology Act of 2006 (38 U.S.C. 8127-8128), created an acquisition program for small business concerns owned and controlled by service-disabled veterans and those owned and controlled by veterans for VA.

(b) The purpose of the program is to provide contracting assistance to SDVOSBs and VOSBs.

24. 48 C.F.R. 819.7002 (2011) provides:

Applicability.

This subpart applies to VA contracting activities and to its prime contractors. Also, this subpart applies to any government entity that has a contract, memorandum of understanding, agreement, or other arrangement with VA to acquire goods and services for VA in accordance with 817.502.

25. 48 C.F.R. 819.7003 (2011) provides:

Eligibility.

(a) Eligibility of SDVOSBs and VOSBs continues to be governed by the Small Business Administration regulations, 13 CFR subparts 125.8 through 125.13, as well as the FAR, except where expressly directed otherwise by the VAAR, and 38 CFR verification regulations for SDVOSBs and VOSBs.

(b) At the time of submission of offer, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB concern or VOSB concern;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Verified for eligibility in the VIP database.

(c) A joint venture may be considered an SDVOSB or VOSB concern if

(1) At least one member of the joint venture is an SDVOSB or VOSB concern, and makes the representations in paragraph (b) of this section;

(2) Each other concern is small under the size standard corresponding to the NAICS code assigned to the procurement;

(3) The joint venture meets the requirements of paragraph 7 of the size standard explanation of affiliates in FAR 19.101; and

(4) The joint venture meets the requirements of 13 CFR 125.15(b), modified to include veteran-owned small businesses where this CFR section refers to SDVOSB concerns.

(d) Any SDVOSB or VOSB concern (nonmanufacturer) must meet the requirements in FAR 19.102(f) to receive a benefit under this program.

26. 48 C.F.R. 819.7004 (2011) provides:

Contracting Order of Priority.

In determining the acquisition strategy applicable to an acquisition, the contracting officer shall consider, in the following order of priority, contracting preferences that ensure contracts will be awarded:

(a) To SDVOSBs;

(b) To VOSB, including but not limited to SDVOSBs;

(c) Pursuant to—

(1) Section 8(a) of the Small Business Act (15 U.S.C. 637(a)); or

(2) The Historically-Underutilized Business Zone (HUBZone) Program (15 U.S.C. 657a); and

(d) Pursuant to any other small business contracting preference.

27. 48 C.F.R. 819.7005 (2011) provides:

Service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set-aside an acquisition for competition restricted to SDVOSB concerns upon a reasonable expectation that,

(1) Offers will be received from two or more eligible SDVOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure:

(1) Eligibility is extended to businesses owned and operated by surviving spouses; and

(2) Businesses are registered and verified as eligible in the VIP database prior to making an award.

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible SDVOSB concern in response to a SDVOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition, if appropriate.

28. 48 C.F.R. 819.7006 (2011) provides:

Veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 813.106, 819.7007 and 819.7008, the contracting officer shall set aside an acquisition for competition restricted to VOSB concerns upon a reasonable expectation that:

(1) Offers will be received from two or more eligible VOSB concerns; and

(2) Award will be made at a fair and reasonable price.

(b) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VOSB concern in response to a VOSB set-aside, the contracting officer should make an award to that concern. If the contracting officer receives no acceptable offers from eligible VOSB concerns, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs, as appropriate.

(c) When conducting VOSB set-asides, the contracting officer shall ensure the business is registered and verified as eligible in the VIP database prior to making an award.

29. 48 C.F.R. 819.7007 (2011) provides:

Sole source awards to service-disabled veteran-owned small business concerns.

(a) A contracting officer may award contracts to SDVOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The SDVOSB concern has been determined to be a responsible contractor with respect to performance; and

(4) Award can be made at a fair and reasonable price.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one SDVOSB concern is available to meet the requirement is not required.

(c) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

30. 48 C.F.R. 819.7008 (2011) provides:

Sole source awards to veteran-owned small business concerns.

(a) A contracting officer may award contracts to VOSB concerns on a sole source basis provided:

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized in accordance with FAR part 5;

(3) The VOSB concern has been determined to be a responsible contractor with respect to performance;

(4) Award can be made at a fair and reasonable price; and

(5) No responsible SDVOSB concern has been identified.

(b) The contracting officer's determination whether to make a sole source award is a business decision wholly within the discretion of the contracting officer. A determination that only one VOSB concern is available to meet the requirement is not required.

(c) When conducting a VOSB sole source acquisition, the contracting officer shall ensure businesses are registered and verified as eligible in the VIP database prior to making an award.

31. 48 C.F.R. 819.7009 (2011) provides:

Contract clauses.

The contracting officer shall insert VAAR clause 852.219-10, Notice of Total Service-Disabled Veteran-Owned Small Business Set-Aside or 852.219-11, Notice of Total Veteran-Owned Small Business Set-Aside in solicitations and contracts for acquisitions under this subpart